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A SELECTION OF CASES
ON
THE LAW OF TORTS.

BY
JAMES BARR AMES AND JEREMIAH SMITH.

THIRD EDITION.

VOLUME I.

By JAMES BARR AMES,
BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

CAMBRIDGE:
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ADDENDA.

Page 239, note 1. Add: There are authorities in the contrary direction; holding that, under various circumstances, an unconstitutional act or ordinance is not to be regarded as an absolute nullity during the interval elapsing between the date of its enactment and the date upon which it was judicially pronounced unconstitutional. For some cases illustrating this view, see *Cooley*, Const. Lim., 7th ed., p. 259, note 2. See also authorities collected in 47 L. R. Ann., note, 512-519. Compare *State v. Carroll*, 38 Conn. 449, with *Norton v. Shelby County*, 118 U. S. 425.

Page 418, note 7. Add: See also *Hulton v. Jones*, L. R., (1910) Appeal Cases, 20; affirming majority decision in L. R., (1909) 2 K. B. 444.

Page 436, note 2, line 4. For "338-9" substitute "238-9."

Page 570, note 2, line 4. For "majority" substitute "minority."

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CASES ON TORTS.

CHAPTER I.

TRESPASS.

SECTION I.

Assault.

I. DE S. AND WIFE *v.* W. DE S.

AT THE ASSIZES, CORAM THORPE, C. J., 1348 OR 1349.

[Reported in *Year-Book, Liber Assisarum, folio, 99, placitum 60.*]

I. De S. & M. uxor ejus querunt de W. De S. de eo quod idem W. anno, &c., vi et armis, &c., apud S., in ipsam M. insultum fecit, et ipsam verberavit, &c. And W. pleaded not guilty. And it was found by verdict of the inquest that the said W. came in the night to the house of the said I., and would have bought some wine, but the door of the tavern was closed; and he pounded on the door with a hatchet, which he had in his hand, and the female plaintiff put her head out at a window and told him to stop; and he saw her and aimed at her with the hatchet, but did not hit her. Whereupon the inquest said that it seemed to them that there was no trespass, since there was no harm done. THORPE, C. J. There is harm done, and a trespass for which they shall recover damages, since he made an assault upon the woman, as it is found, although he did no other harm. Wherefore tax his damages, &c. And they taxed the damages at half a mark. THORPE, C. J., awarded that they should recover their damages, &c., and that the other should be taken. *Et sic nota*, that for an assault one shall recover damages, &c.¹

¹ Lib. Ass. fol. 134, pl. 11; Y. B. 40 Edw. III. fol. 40, pl. 19; Y. B. 42 Edw. III. fol. 7, pl. 25; Y. B. 45 Edw. III. fol. 24, pl. 35; Y. B. 7 Edw. IV. fol. 24, pl. 31; Y. B. 17 Edw. IV. fol. 4, pl. 2; Y. B. 18 Edw. IV. fol. 28, pl. 24; Y. B. 11 Hen. VII. fol. 20, pl. 4; Smith *v.* Newsam, 1 Vent. 256; Tombs *v.* Painter, 13 East, 1; Lewis *v.* Hoover, 3 Blackf. 407; Handy *v.* Johnson, 5 Md. 450; Leach *v.* Leach, 11 Tex. Civ. Ap. 699; Ewing *v.* Mar, (Court of Sess. Dec. 23, 1851) Accord. — ED.

TUBERVILLE v. SAVAGE.

IN THE KING'S BENCH, TRINITY TERM, 1669.

[Reported in 1 *Modern Reports*, 3.]

ACTION of assault, battery, and wounding. [The defendant pleaded the plaintiff began first; and the stroke he received, whereby he lost his eye, was on his own assault, and in defence of the defendant.¹] The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was, if that were an assault? The court agreed that it was not; for the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault.² Therefore, if one strike another upon the hand or arm or breast, in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

MORTIN v. SHOPPEE.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., OCTOBER 27, 1828.

[Reported in 3 *Carrington & Payne*, 373.]

ASSAULT. Plea: General issue. The plaintiff was walking along a foot-path by the roadside at Hillingdon, and the defendant, who was on horseback, rode after him at a quick pace. The plaintiff ran away, and got into his own garden; when the defendant rode up to the garden-gate (the plaintiff then being in the garden about three yards from him), and, shaking his whip, said, "Come out, and I will lick you before your own servants."

LORD TENTERDEN, C. J. If the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter, to avoid being beaten, that is in law an assault.

Verdict for the plaintiff. Damages, 40s.³

¹ Taken from the report in 2 Keb. 545. — Ed.

² Blake v. Barnard, 9 C. & P. 626; State v. Crow, 1 Ired. 375; Commonwealth v. Eyre, 1 S. & R. 347 Accord.

Similarly, a mere preparation for a possible assault, but without any act indicating a present intention to do personal violence to another, is not an assault. Lawson v. State, 30 Ala. 14; Penny v. State, 114 Ga. 77. — Ed.

³ State v. Sims, 3 Strob. 137 Accord. — Ed.

STEPHENS v. MYERS.

AT NISI PRIUS, CORAM TINDAL, C. J., JULY 17, 1830.

[Reported in 4 Carrington & Payne, 349.]

ASSAULT. The declaration stated that the defendant threatened and attempted to assault the plaintiff. Plea: Not guilty.

It appeared that the plaintiff was acting as chairman at a parish meeting, and sat at the head of a table, at which table the defendant also sat, there being about six or seven persons between him and the plaintiff. The defendant having, in the course of some angry discussion which took place, been very vociferous, and interrupted the proceedings of the meeting, a motion was made that he should be turned out, which was carried by a very large majority. Upon this the defendant said he would rather pull the chairman out of the chair than be turned out of the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman, but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman.

Spankie, Serjt., for the defendant, upon this evidence, contended that no assault had been committed, as there was no power in the defendant, from the situation of the parties, to execute his threat, — there was not a present ability, — he had not the means of executing his intention at the time he was stopped.

TINDAL, C. J., in his summing up, said: It is not every threat, when there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. The question I shall leave to you will be, whether the defendant was advancing at the time, in a threatening attitude, to strike the chairman, so that his blow would almost immediately have reached the chairman if he had not been stopped; then, though he was not near enough at the time to have struck him, yet, if he was advancing with that intent, I think it amounts to an assault in law. If he was so advancing that, within a second or two of time, he would have reached the plaintiff, it seems to me it is an assault in law. If you think he was not advancing to strike the plaintiff, then only can you find your verdict for the defendant; otherwise you must find it for the plaintiff, and give him such damages as you think the nature of the case requires.

Verdict for the plaintiff. Damages, 1s.¹

¹ Fairme's Case, 5 City Hall Rec. 95 Accord.

Compare Cobbett v. Grey, 4 Ex. 744, per Pollock, C. B.; People v. Lilley, 43 Mich. 521. — ED.

CHRISTOPHERSON v. BARE.

IN THE QUEEN'S BENCH, FEBRUARY 8, 1848.

[Reported in 11 *Queen's Bench Reports*, 473.]

TRESPASS. The declaration charged that defendant, to wit, on, &c., assaulted plaintiff, and then imprisoned him, and kept and detained him in prison for a long time, to wit, for the space of one month and twenty-five days, contrary to law, and against the will of plaintiff, and until plaintiff, in order to obtain his release, &c., was forced to and did procure an order of Wightman, J., for his discharge from the said imprisonment. Damage by payment of moneys, &c.

Plea: That defendant, at the said several times when, &c., by the leave and license of plaintiff, to him for that purpose first given and granted, committed the trespasses in the declaration mentioned. Verification.

Demurrer: As to so much and such part of the plea as relates to the assaulting plaintiff, and imprisoning him, and keeping and detaining him in prison for the space of thirty-three days, part of the said space of one month and twenty-five days, that the same is not sufficient in law. For that the plaintiff's having given leave and license to commit the trespasses cannot in law be a justification of the same. And for that the plea amounts to an argumentative plea of not guilty, and is an argumentative traverse of defendant's having imprisoned plaintiff. And for that the plea ought to have concluded to the country.

Joinder in demurrer.

O'Malley, for the plaintiff.

Pearson, contra.¹

LORD DENMAN, C. J. We need not decide whether an imprisonment can be confessed and avoided in this way; but, as to the assault, it is a manifest contradiction in terms to say that the defendant assaulted the plaintiff by his permission.

PATTESON, J. I doubt much as to the imprisonment; but the plea is clearly bad as to the assault, and, if bad for any part, it is bad for all. An assault must be an act done against the will of the party assaulted, and, therefore, it cannot be said that a party has been assaulted by his own permission.

COLERIDGE, J. If the plea had been only not guilty, the defendant might have shown that the act was done in the course of sport between the parties, and by the plaintiff's leave. This plea is, therefore, specially demurrable.

WIGHTMAN, J. I agree, and for the reasons already given.

*Judgment for plaintiff.*²

¹ The arguments of counsel are omitted. — Ed.

² See *Ringham v. Clements*, 12 Q. B. 260, 262. — Ed.

READ v. COKER.

IN THE COMMON PLEAS, JUNE 1, 1853.

[Reported in 13 Common Bench Reports, 850.]

ASSAULT and false imprisonment.¹ The first count charged an assault committed by the defendant on the plaintiff on the 24th of March, 1853, by thrusting him out of a certain workshop.

Plea: Not guilty "by statute," upon which issue was joined.

The cause was tried before Talfourd, J., at the first sitting in London in Easter term last. The facts which appeared in evidence were as follows: The plaintiff was a paper-stainer, carrying on business in the City Road, upon premises which he rented of one Molineux, at a rent of 8s. per week. In January, 1852, the rent being sixteen weeks in arrear, the landlord employed one Holliwell to distrain for it. Holliwell accordingly seized certain presses, lathes, and other trade fixtures, and, at the plaintiff's request, advanced him £16 upon the security of the goods, for the purpose of paying off the rent. The plaintiff, being unable to redeem his goods, on the 23d of February applied to the defendant for assistance. The goods were thereupon sold to the defendant by Holliwell, on the part of Read, for £25 11s. 6d.; and it was agreed between the plaintiff and the defendant that the business should be carried on for their mutual benefit, the defendant paying the rent of the premises and other outgoings, and allowing the plaintiff a certain sum weekly.

The defendant, becoming dissatisfied with the speculation, dismissed the plaintiff on the 22d of March. On the 24th, the plaintiff came to the premises, and, refusing to leave when ordered by the defendant, the latter collected together some of his workmen, who mustered round the plaintiff, tucking up their sleeves and aprons, and threatened to break his neck if he did not go out; and, fearing that the men would strike him if he did not do so, the plaintiff went out. This was the assault complained of in the first count. Upon this evidence the learned judge left it to the jury to say whether there was an intention on the part of the defendant to assault the plaintiff, and whether the plaintiff was apprehensive of personal violence if he did not retire. The jury found for the plaintiff on this count. Damages, one farthing.

Byles, Serjt., on a former day in this term, moved for a rule *nisi* for a new trial, on the ground of misdirection, and that the verdict was not warranted by the evidence. That which was proved as to the first count clearly did not amount to an assault. [JERVIS, C. J. It was as much an assault as a sheriff's officer being in a room with a man against whom he has a writ, and saying to him, "You are my prisoner," is an arrest.] To constitute an assault, there must be something more than a threat of violence. An assault is thus defined in Buller's *Nisi*

¹ Only so much of the case is given as relates to the question of assault.

Prius, p. 15: "An assault is an attempt or offer, by force or violence, to do a corporal hurt to another, as by pointing a pitchfork at him, when standing within reach; presenting a gun at him [within shooting distance]; drawing a sword, and waving it in a menacing manner, &c. *The Queen v. Ingram*.¹ But no words can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action: 1 Hawk. P. C. 133; as if a man were to lay his hand upon his sword, and say, 'If it were not assize-time, he would not take such language,'—the words would prevent the action from being construed to be an assault, because they show he had no intent to do him any corporal hurt at that time: *Tuberville v. Savage*." So, in Selwyn's *Nisi Prius* (11th ed.), 26, it is said: "An assault is an attempt, with force or violence, to do a corporal injury to another, as by holding up a fist in a menacing manner; striking at another with a cane or stick, though the party striking may miss his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach (*Genner v. Sparks*); or by any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability (see *Stephens v. Myers*), of using actual violence against the person of another." So, in § Bl. Comm. 120, an assault is said to be "an attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him: this is an assault, *insultus*, which Finch (L. 202) describes to be 'an unlawful setting upon one's person.'" [JERVIS, C. J. If a man comes into a room, and lays his cane on the table, and says to another, "If you don't go out I will knock you on the head," would not that be an assault?] Clearly not: it is a mere threat, unaccompanied by any gesture or action towards carrying it into effect. The direction of the learned judge as to this point was erroneous. He should have told the jury that to constitute an assault there must be an attempt, coupled with a present ability, to do personal violence to the party; instead of leaving it to them, as he did, to say what the plaintiff thought, and not what they (the jury) thought was the defendant's intention. There must be some act done denoting a present ability and an intention to assault.

A rule *nisi* having been granted,

Allen, Serjt., and *Charnock* now showed cause. The first question is, whether the evidence was sufficient, as to the first count, to justify the learned judge in putting it to the jury whether or not the defendant had been guilty of an assault. The evidence was, that the plaintiff was surrounded by the defendant and his men, who, with their sleeves and aprons tucked up, threatened to break his neck if he did not quit the workshop. [MAULE, J. If there can be such a thing as an assault without an actual beating, this is an assault.]

¹ 1 Salk. 384.

JERVIS, C. J. I am of opinion that this rule cannot be made absolute to its full extent; but that, so far as regards the first count of the declaration, it must be discharged. If anything short of actual striking will in law constitute an assault, the facts here clearly showed that the defendant was guilty of an assault. There was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

MAULE, J., CRESSWELL, J., and TALFOURD, J., concurring,
*Rule discharged as to the first count.*¹

OSBORN v. VEITCH.

AT NISI PRIUS, CORAM WILLES, J., KENT SUMMER ASSIZES, 1858.

[Reported in 1 Foster & Finlason, 317.]

TRESPASS and assault. Pleas: Not guilty, and *son assault demesne*. Issue.

The plaintiffs were owners of a field in which the defendants were walking with loaded guns at half-cock in their hands. The plaintiffs desired them to withdraw and give their names, and on their refusal advanced towards them, apparently as if to apprehend them. The defendants half raised their guns, which they pointed towards them, and threatened to shoot them. The plaintiffs (one of whom was a constable) then gave them in charge to a policeman for shooting with intent, and he, with their assistance, seized and handcuffed them.

E. James submitted that there was no assault; as the guns were only at half-cock, there was no "present ability" to execute the threat. *Read v. Coker*.

Sed per WILLES, J. Pointing a loaded gun at a person is in law an assault. It is immaterial that it is at half-cock; cocking it is an instantaneous act, and there is a "present ability" of doing the act threatened, for it can be done in an instant.²

E. James. The assault was in self-defence; the defendants were only trespassers, and there was an attempt to apprehend them, and excess is not even assigned. *Broughton v. Jackson*.³

WILLES, J. It was not necessary that it should be. To shoot a man is not a lawful way of repelling an assault. No doubt the charge of shooting with intent was idle,⁴ and the assault was only a misdemeanor. The handcuffing was utterly unlawful.

Verdict for the plaintiff. Damages, one farthing.

¹ *United States v. Kiernan*, 3 Cranch, C. C. 435; *People v. Lee*, 1 Wheeler, Crim. Cas. 364; *State v. Davis*, 1 Ired. 125; *Alexander v. Blodgett*, 44 Vt. 476; *Newell v. Whitcher*, 53 Vt. 539; *Bishop v. Ranney*, 59 Vt. 316; *Barnes v. Martin*, 15 Wis. 240; *Keep v. Quallman*, 68 Wis. 451 *Accord.* — Ed.

² *State v. Church*, 63 N. Ca. 15 *Accord.* — Ed.

³ 18 Q. B. 378.

⁴ See *Hogg v. Burgess*, 27 L. J. Ex. 318.

UNITED STATES v. ALLISON RICHARDSON.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF COLUMBIA,
NOVEMBER TERM, 1837.

[Reported in 5 Cranch, Circuit Court Reports, 348.]

INDICTMENT for an assault upon one Susan Shelton.

The evidence was that the defendant came into the house where Mrs. Shelton was sitting at a window. He was armed with a musket and a club; and raising the club over her head, in an attitude for striking, and within striking distance, said to her that if she said a word (or if she opened her mouth) he would strike her; and this without any provocation on her part.

Mr. Bradley and *Mr. Hoban*, for the defendant, contended that this was not, in law, an assault; that there can be no assault without a present intent to strike; and his saying, "if she opened her mouth," showed that he had not such a present intent; and they cited the old case, "if it were not the assizes, I would stab you."

But the COURT (THURSTON, J., absent) said that he had no right to restrain her from speaking; and his language showed an intent to strike upon her violation of a condition which he had no right to impose. Suppose a stranger comes to my house armed, and raises his club over my head, within striking distance, and threatens to beat me unless I will go out of and abandon my house; surely that would be an assault. So, if a highwayman puts a pistol to my breast, and threatens to shoot me unless I give him my money; this would be evidence of an assault, and would be charged as such in the indictment.

*Verdict, guilty; fined ten dollars.*¹

BEACH v. HANCOCK.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, DECEMBER
TERM, 1853.

[Reported in 27 New Hampshire Reports, 223.]

TRESPASS, for an assault.

Upon the general issue it appeared that, the plaintiff and defendant being engaged in an angry altercation, the defendant stepped into his office, which was at hand, and brought out a gun, which he aimed at the plaintiff in an excited and threatening manner, the plaintiff being

¹ United States v. Myers, 1 Cranch, C. C. 310; Keefe v. State, 19 Ark. 190; State v. Herron (Mont. 1892), 29 Pac. R. 819; State v. Morgan, 3 Ired. 186; State v. Church, 63 N. Ca. 15 *Accord.* — ED.

three or four rods distant. The evidence tended to show that the defendant snapped the gun twice at the plaintiff, and that the plaintiff did not know whether the gun was loaded or not, and that, in fact, the gun was not loaded.

The court ruled that the pointing of a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not.

The court, among other things, instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages in actions for breaches of the peace would have to encourage a disregard of the laws and disturbances of the public peace.

The defendant excepted to these rulings and instructions.

The jury having found a verdict for the plaintiff, the defendant moved for a new trial by reason of said exceptions.

Morrison and Fitch, for the defendant. The first question arising in this case is, Is it an assault to point an unloaded gun at a person in a threatening manner? An assault is defined to be an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev. 72. The attempt or offer with violence to do corporal hurt to another must be coupled with a present ability to constitute an assault. Roscoe's Crim. Ev. 287; 1 Russell on Crimes, 750. It is no assault to point an unloaded gun or pistol at another, &c. *Blake v. Barnard*,¹ *Regina v. Baker*,² *Regina v. James*.³ The court erred in instructing the jury that the pointing of a gun in an angry and threatening manner was an assault. It is well settled that the intention to do harm is the essence of an assault, and this intent is to be collected by the jury from the circumstances of the case. 2 Greenl. Ev. 73.

D. and D. J. Clerk, for the plaintiff.⁴

GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant to show that the ruling of the court was incorrect. Among them is the case of *Regina v. Baker*.² In that case, the prisoner was indicted under the statute of 7 Will. IV. and 1 Vict. c. 85, for attempting to discharge a loaded pistol. Rolfe, B., told the jury that they must consider whether the pistol was in such a state of loading that, under ordinary circumstances, it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also, "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly, in the case where the pistol was loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury."

¹ 9 C. & P. 626.

² 1 Car. & K. 254.

³ 1 Car. & K. 530.

⁴ The argument for the plaintiff is omitted. — ED.

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting a loaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of *Regina v. James*¹ was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. Tindal, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vict. c. 85, and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged." The reason why the prisoner could not be convicted of the assault is given in the case of *Regina v. St. George*,² where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault, which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault, which is involved in the felony itself. In this case, Parke, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent." So if a person present a pistol purporting to be a loaded pistol at another, and so near as to have been dangerous to life if the pistol had gone off; *semble*, that this is an assault, even though the pistol were, in fact, not loaded. *Ibid*.

In the case of *Blake v. Barnard*,³ which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord Abinger then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct, under that declaration, for the variance. *Regina v. Oxford*.⁴

One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury, when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort, if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no

¹ 1 C. & K. 530.

³ 9 C. & P. 626.

² 9 C. & P. 483.

⁴ 9 C. & P. 525.

reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace — damages incommensurate with the injury sustained — would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced. *Flanders v. Colby*.¹

*Judgment on the verdict.*²

STEARNS AND WIFE v. SAMPSON.

SUPREME JUDICIAL COURT, MAINE, 1871.

[Reported in 59 Maine Reports, 568.]

ON exceptions, and motion to set aside the verdict as being against law.

Trespass. The writ contained three counts: one for breaking and entering the plaintiffs' close and carrying away the household furniture; the second, for taking and carrying away the household furniture of the wife; and the third,³ for assault on the wife.

There was evidence tending to show that after entry and notice to leave, and refusal by the wife and her mother, with an expressed determination on their part to hold possession against the defendant, the latter called in assistants and ordered them to remove the furniture, and they did remove it from some of the rooms; that upon going to one of the rooms, the door was fastened, and the assistants opened it; that the furniture, except bed, was removed from Mrs. Stearns' sleeping-room.

That the assistants remained there several days and nights.

That the defendant caused the windows to be removed; prevented food from being carried to the house; that a tenant was let into the L of the house, and had charge of the defendant's bloodhound, five months old, and permitted him to go into the house; that the furniture was removed into a house near by, and Mrs. Stearns notified of its

¹ 28 N. H. 34.

² In *Chapman v. State*, 78 Ala. 463; *State v. Sears*, 86 Mo. 169; *State v. Godfrey*, 17 Or. 300; *McKay v. State*, 44 Tex. 43, it was decided that a defendant who aimed an unloaded pistol at another, although perhaps liable for a civil assault, was not guilty of a criminal assault. See also 2 Green, Cr. Cas. 271 n. But there would seem to be no sound basis for such a distinction. Such conduct was, therefore, rightly held to be a criminal assault in *State v. Shepard*, 10 Iowa, 126; *Commonwealth v. White*, 110 Mass. 409; *State v. Smith*, 2 Humph. 457; *Richels v. State*, 1 Sneed, 606 (*semble*); *Morison's Case*, 1 Brown, Just. R. (Scotch) 394. In *Commonwealth v. White*, *supra*, Wells, J., said: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material, but what his conduct and the attending circumstances denote at the time to the party assaulted." — Ed.

³ Only so much of the case is given as relates to this count. — Ed.

whereabouts; that the doors fastened by Mrs. Stearns were removed; that Mrs. Stearns finally left by compulsion with an officer, and was sick several weeks.

The rulings sufficiently appear in the opinion.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions, and also filed motions to set aside the verdict as being against law and the weight of evidence.

J. W. Bradbury and *L. Clay*, for the plaintiffs.

A. Libbey, for the defendant.

APPLETON, C. J. There is in the declaration a count for an assault and battery upon the female plaintiff. In reference to this branch of the case, the following instructions were given: "Was there a trespass committed upon the female plaintiff? She is the only one who seeks for damages. Whatever may have been the injury inflicted upon the other inmates of that house, she can recover on this suit only for that which was inflicted upon her. In order to constitute an assault, it is not necessary that the person should be touched, but there should be certain indignities. In the language of one of the decisions, if the plaintiff was embarrassed and distressed by the acts of the defendant, it would amount in law to an assault." The acts and indignities which from the charge might constitute an assault, were the bursting open a door, which the defendants had no right to fasten, and the inconveniences resulting from taking off the doors and taking out the windows, which made it uncomfortable for the female plaintiff to remain, where remaining, she was a trespasser. So the bringing a bloodhound by the defendant into his house, which is proved to have barked, but not to have bitten, and the making a noise therein, with other similar acts, it was contended, would amount to an assault and trespass, and of that the jury were to judge. Now, such is not the law. An assault and battery is clearly defined by R. S., c. 118, § 28, thus: "Whoever unlawfully attempts to strike, hit, touch, or do any violence to another, however small, in a wanton, wilful, angry, or insulting manner, having an intention and existing ability to do some violence to such person, shall be deemed guilty of an assault; and if such attempt is carried into effect, he shall be deemed guilty of an assault and battery." Now, the removal of a door or windows, of the owner in possession, would constitute no assault. Indeed, as has been seen, 6 Allen, 76, the owner would, in attempting it, have the right to use as much force as was necessary to overcome the resistance of the unlawfully resisting and trespassing tenant. Acts which may embarrass and distress do not necessarily amount to an assault. Indignities may not constitute an assault. Acts aggravating an assault differ materially from the assault thereby aggravated. Insulting language or conduct may aggravate an assault, but it is not an assault.¹ So the acts of the defendant in taking

¹ *State v. Daniel*, 136 N. C. 571; *Degenhardt v. Heller*, 93 Wis. 662 *Accord.* Nor is it an assault to make the kissing sign to another. *Fuller v. State*, 44 Tex. Cr. R. 463.

No action lies for the shame and insult to a woman from inviting her to illicit intercourse. *Davis v. Richardson*, 76 Ark. 640; *Reed v. Maley*, 115 Ky. 816; *Lindsey v. Dixon*, 52

out the windows of his own house, in a bleak and cold day, might distress one unlawfully occupying and illegally refusing to quit his premises, but they could in no sense be regarded as an assault upon her. One may be embarrassed and distressed by acts done "in a wanton, wilful, angry, or insulting manner," where there is no "intention nor existing ability to do some violence" to the person, and yet there be no assault. The instruction on this point is equally at variance with the common law and the statute of the State.¹

WILKINSON v. DOWNTON.²

QUEEN'S BENCH DIVISION, MAY 8, 1897.

[*Law Reports* [1897], 2 *Queen's Bench*, 57.]

WRIGHT, J.³ In this case the defendant, in the execution of what he seems to have regarded as a practical joke, represented to the plaintiff that he was charged by her husband with a message to her to the effect that her husband was smashed up in an accident, and was lying at The Elms at Leytonstone with both legs broken, and that she was to go at once in a cab with two pillows to fetch him home. All this was false. The effect of the statement on the plaintiff was a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance. These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

In addition to these matters of substance there is a small claim for 1s. 10½d. for the cost of railway fares of persons sent by the plaintiff to Leytonstone in obedience to the pretended message. As to this 1s. 10½d. expended in railway fares on the faith of the defendant's statement, I think the case is clearly within the decision in *Pasley v. Freeman*, (1789) 3 T. R. 51. The statement was a misrepresentation intended to be acted on to the damage of the plaintiff.

Mo. Ap. 291. But a common carrier is liable, as a public service company, for insults to a passenger by its employees. *Knoxville Co. v. Lane*, 103 Tenn. 376. — Ed.

¹ *Meador v. Stone*, 7 Met. (Mass.) 147 *Accord*.

See *Rex v. Smith*, 2 C. & P. 449; *Preiser v. Wielandt*, 48 N. Y. Ap. Div. 569. — Ed.

² This case and the two following cases, although not cases of assault, it has seemed fitting to insert here as instances of injuries to the person without impact. — Ed.

³ Only the judgment of the court is given. — Ed.

The real question is as to the 100*l.*, the greatest part of which is given as compensation for the female plaintiff's illness and suffering. It was argued for her that she is entitled to recover this as being damage caused by fraud, and therefore within the doctrine established by *Pasley v. Freeman*, (1789) 3 T. R. 51, and *Langridge v. Levy*, (1837) 2 M. & W. 519. I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no *injuria* of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful *injuria* is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant.

It remains to consider whether the assumptions involved in the proposition are made out. One question is whether the defendant's act was so plainly calculated to produce some effect of the kind which was produced that an intention to produce it ought to be imputed to the defendant, regard being had to the fact that the effect was produced on a person proved to be in an ordinary state of health and mind. I think that it was. It is difficult to imagine that such a statement, made suddenly and with apparent seriousness, could fail to produce grave effects under the circumstances upon any but an exceptionally indifferent person, and therefore an intention to produce such an effect must be imputed, and it is no answer in law to say that more harm was done than was anticipated, for that is commonly the case with all wrongs. The other question is whether the effect was, to use the ordinary phrase, too remote to be in law regarded as a consequence for which the defendant is answerable. Apart from authority, I should give the same answer and on the same ground as the last question, and say that it was not too remote. Whether, as the majority of the House of Lords thought in *Lynch v. Knight*, (1861) 9 H. L. C. 577, at pp. 592, 596, the criterion is in asking what would be the natural effect on reasonable persons, or whether, as Lord Wensleydale thought (9 H. L. C. 587, at p. 600), the possible infirmities of human nature ought to be recognized, it seems to me that the connection between the cause and the effect is sufficiently close and complete. It is, however, necessary to consider two authorities which are supposed to have laid down that illness through mental shock is a too remote or unnatural consequence of an *injuria* to entitle the plaintiff to recover in a case where damage is a necessary part of the cause of action. One is the case of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, where it was held in the Privy Council that

illness which was the effect of shock caused by fright was too remote a consequence of a negligent act which caused the fright, there being no physical harm immediately caused. That decision was treated in the Court of Appeal in *Pugh v. London, Brighton and South Coast Ry. Co.*, [1896] 2 Q. B. 248, as open to question. It is inconsistent with a decision in the Court of Appeal in Ireland: *Bell v. Great Northern Ry. Co. of Ireland*, (1890) 26 L. R. Ir. 428, where the Irish Exchequer Division refused to follow it; and it has been disapproved in the Supreme Court of New York; see Pollock on Torts, 4th ed. p. 47 (n). Nor is it altogether in point, for there was not in that case any element of wilful wrong; nor perhaps was the illness so direct and natural a consequence of the defendant's conduct as in this case. On these grounds it seems to me that the case of *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222, is not an authority on which this case ought to be decided.

A more serious difficulty is the decision in *Allsop v. Allsop*, 5 H. & N. 534, which was approved by the House of Lords in *Lynch v. Knight*, 9 H. L. C. 577. In that case it was held by Pollock, C. B., Martin, Bramwell, and Wilde, BB., that illness caused by a slanderous imputation of unchastity in the case of a married woman did not constitute such special damage as would sustain an action for such a slander. That case, however, appears to have been decided on the ground that in all the innumerable actions for slander there were no precedents for alleging illness to be sufficient special damage, and that it would be of evil consequence to treat it as sufficient, because such a rule might lead to an infinity of trumpery or groundless actions. Neither of these reasons is applicable to the present case. Nor could such a rule be adopted as of general application without results which it would be difficult or impossible to defend. Suppose that a person is in a precarious and dangerous condition, and another person tells him that his physician has said that he has but a day to live. In such a case, if death ensued from the shock caused by the false statement, I cannot doubt that at this day the case might be one of criminal homicide, or that if a serious aggravation of illness ensued damages might be recovered. I think, however, that it must be admitted that the present case is without precedent. Some English decisions — such as *Jones v. Boyce*, (1816) 1 Stark. 493; *Wilkins v. Day*, (1883) 12 Q. B. D. 110; *Harris v. Mobbs*, (1878) 3 Ex. D. 268 — are cited in Beven on Negligence as inconsistent with the decision in *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222. But I think that those cases are to be explained on a different ground, namely, that the damage which immediately resulted from the act of the passenger or of the horse was really the result not of that act, but of a fright which rendered that act involuntary, and which therefore ought to be regarded as itself the direct and immediate cause of the damage. In *Smith v. Johnson & Co.*, (unreported), decided in January last, Bruce, J., and I held that where a man was killed in the sight of the plaintiff

by the defendant's negligence, and the plaintiff became ill, not from the shock from fear of harm to himself, but from the shock of seeing another person killed, this harm was too remote a consequence of the negligence. But that was a very different case from the present.

There must be judgment for the plaintiff for 100*l.* 1*s.* 10½*d.*

*Judgment for plaintiff.*¹

MARGARET C. SPADE v. LYNN & BOSTON R. CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 19, 1897.

[168 *Massachusetts*, 285.]

TORT, for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant. The declaration contained three counts.

The third count² alleged that while the plaintiff was a passenger in the defendant's car, and in the exercise of due care, "one of the defendant's agents or servants, in attempting to remove from the said car a certain person claimed and alleged by said defendant's agent to be noisy, turbulent, and unfit to remain as a passenger in said car, conducted himself with such carelessness, negligence, and with the use of such unnecessary force, that said agent and servant, acting thus negligently, created a disorder, disturbance, and quarrel in said car, and thereby frightened the plaintiff and subjected her to a severe nervous shock, by which nervous shock the plaintiff was physically prostrated and suffered, and has continued to suffer, great mental and physical pain and anguish, and has been put to great expense."

The defendant's answer was a general denial.

Trial in the Superior Court, before MASON, C. J.

The plaintiff testified, among other things, that the conductor in putting off an intoxicated man twitched him in such a way as to push another intoxicated man over on to the plaintiff. The evidence for the defendant tended to disprove plaintiff's claim that either of the intoxicated persons came in contact with her, or assaulted her.

The defendant requested (*inter alia*) an instruction, that there was no evidence to warrant a verdict on the third count. This request was refused.

¹ *Dunn v. Western Co.*, (Ga. 1907) 59 S. E. R. 189 (*semble*); *Watson v. Dilts*, 116 Iowa, 249, 124 Iowa, 249; *Nelson v. Crawford*, 122 Mich. 466 (*semble*); *Preiser v. Wielandt*, 48 N. Y. Ap. Div. 569; *Buchanan v. Stout*, 123 N. Y. Ap. Div. 648 (*semble*); *Miller v. R. R. Co.*, 78 Oh. St. 309, 324 (*semble*); *Butler v. Western Co.*, 62 S. Ca. 222 (*semble*); *Western Co. v. Watson*, 82 Miss. 101 (*semble*); *Shellabarger v. Morris*, 115 Mo. Ap. 566 *Accord*.

Threats not amounting to an Assault. Threats of bodily harm sent by letter and causing illness by reason of apprehension of bodily harm are grounds for an action. *Houston v. Woolley*, 37 Mo. Ap. 15; *Grimes v. Gates*, 47 Vt. 594. Compare *Degenhardt v. Heller*, 93 Wis. 662. — Ed.

² Only so much of the case as relates to this count is given. The arguments are omitted. The statement has been compiled, by Professor Jeremiah Smith, from the bill of exceptions, filed in the Social Law Library. — Ed.

The judge, among other instructions full and applicable to the case, instructed the jury as follows:—

“Now there is a third count to which attention must be called. If the jury should find that there was no bodily injury to the plaintiff direct from the acts of the conductor, that is, no person was thrown against the plaintiff, if that statement is not accurate, the plaintiff still contends that if the manner of the removal was such that it occasioned fright and nervous shock that resulted in bodily injury, that she is still entitled to recover for that bodily injury. And I have to say to you as matter of law, that if the wrongful acts of the conductor, on the occasion of removing the disorderly passenger, did occasion fright and nervous shock to the plaintiff, by reason of which she sustained bodily injury, that she can recover compensation for that injury.

“It is settled law in this State that a person cannot recover for mere fright, fear, or mental distress occasioned by the negligence of another, which does not result in bodily injury.

“But when the fright or fear or nervous shock produces a bodily injury, then there may be recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury. The brain and the nervous system are so closely connected with the mind, are the instruments by which the mind communicates with the body and operates upon it, that we sometimes deal with the nervous conditions as if they were mental conditions, and possibly the testimony has to some extent treated them as one. But for the purpose of the principle which I am now stating, a clear distinction exists between what is mental and what is nervous. The nervous system, the brain and the nerve fibres, are a part of the body, and injury to them is bodily injury. Now if by the wrongful acts of this defendant or its agents, there was a mental shock, fright, and it ended with that, there can be no recovery. But if that mental shock produced a bodily injury, a disturbance of the brain or nervous system which continued and caused subsequent suffering, there may be recovery for that bodily injury and all that follows from it.”

To the above instructions, the defendant excepted.

Verdict for plaintiff. Bill of exceptions.

ALLEN, J. This case presents a question which has not heretofore been determined in this Commonwealth, and in respect to which the decisions elsewhere have not been uniform. It is this: whether in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for a bodily injury caused by mere fright and mental disturbance. The jury were instructed that a person cannot recover for mere fright, fear or mental

distress occasioned by the negligence of another, which does not result in bodily injury,¹ but that when the fright or fear or nervous shock produces a bodily injury, there may be a recovery for that bodily injury, and for all the pain, mental or otherwise, which may arise out of that bodily injury.

In *Canning v. Williamstown*, 1 Cush. 451, it was held, in an action against a town to recover damages for an injury sustained by the plaintiff in consequence of a defective bridge, that he could not recover if he sustained no injury to his person, but merely incurred risk and peril which caused fright and mental suffering. In *Warren v. Boston & Maine Railroad*, 163 Mass. 484, the evidence tended to show that the defendant's train struck the carriage of the plaintiff, thereby throwing him out upon the ground, and it was held to be a physical injury to the person to be thrown out of a wagon, or to be compelled to jump out, even although the harm consists mainly of nervous shock. It was not therefore a case of mere fright, and resulting nervous shock.

The case calls for a consideration of the real ground upon which the liability or non-liability of a defendant guilty of negligence in a case like the present depends. The exemption from liability for mere fright, terror, alarm, or anxiety does not rest on the assumption that these do not constitute an actual injury. They do in fact deprive one of enjoyment and of comfort, cause real suffering, and to a greater or less extent disqualify one for the time being from doing the duties of life. If these results flow from a wrongful or negligent act, a recovery therefor cannot be denied on the ground that the injury is fanciful and not real. Nor can it be maintained that these results may not be the direct and immediate consequence of the negligence. Danger excites alarm. Few people are wholly insensible to the emotions caused by imminent danger, though some are less affected than others.

It must also be admitted that a timid or sensitive person may suffer not only in mind, but also in body, from such a cause. Great emotion may and sometimes does produce physical effects. The action of the heart, the circulation of the blood, the temperature of the body, as well as the nerves and the appetite, may all be affected. A physical injury may be directly traceable to fright, and so may be caused by it. We cannot say, therefore, that such consequences may not flow proximately from unintentional negligence, and if compensation in damages may be recovered for a physical injury so caused, it is hard on principle to say why there should not also be a recovery for the mere mental suffering when not accompanied by any perceptible physical effects.

¹ *Western Co. v. Wood*, 57 Fed. 471; *St. Louis Co. v. Taylor*, 84 Ark. 42; *Chicago Co. v. Moss*, (Ark. 1909), 116 S. W. R. 192; *Kalen v. Terre Haute Co.*, 18 Ind. Ap. 202; *Wyman v. Leavitt*, 71 Me. 227; *Gulf Co. v. Trott*, 86 Tex. 412 *Accord.* — Ed.

It would seem, therefore, that the real reason for refusing damages sustained from mere fright must be something different; and it probably rests on the ground that in practice it is impossible satisfactorily to administer any other rule. The law must be administered in the courts according to general rules. Courts will aim to make these rules as just as possible, bearing in mind that they are to be of general application. But as the law is a practical science, having to do with the affairs of life, any rule is unwise if in its general application it will not as a usual result serve the purposes of justice. A new rule cannot be made for each case, and there must therefore be a certain generality in rules of law, which in particular cases may fail to meet what would be desirable if the single case were alone to be considered.

Rules of law respecting the recovery of damages are framed with reference to the just rights of both parties; not merely what it might be right for an injured person to receive, to afford just compensation for his injury, but also what it is just to compel the other party to pay. One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone. And in determining the rules of law by which the right to recover compensation for unintended injury from others is to be governed, regard must chiefly be paid to such conditions as are usually found to exist. Not only the transportation of passengers and the running of trains, but the general conduct of business and of the ordinary affairs of life, must be done on the assumption that persons who are liable to be affected thereby are not peculiarly sensitive, and are of ordinary physical and mental strength. If, for example, a traveller is sick or infirm, delicate in health, specially nervous or emotional, liable to be upset by slight causes, and therefore requiring precautions which are not usual or practicable for travellers in general, notice should be given, so that, if reasonably practicable, arrangements may be made accordingly, and extra care be observed. But, as a general rule, a carrier of passengers is not bound to anticipate or to guard against an injurious result which would only happen to a person of peculiar sensitiveness. This limitation of liability for injury of another description is intimated in *Allsop v. Allsop*, 5 H. & N. 534, 538, 539. One may be held bound to anticipate and guard against the probable consequences to ordinary people, but to carry the rule of damages further imposes an undue measure of responsibility upon those who are guilty only of unintentional negligence. The general rule limiting damages in such a case to the natural and probable consequences of the acts done is of wide application, and has often been expressed and applied. *Lombard v. Lennox*, 155 Mass. 70; *White v. Dresser*, 135 Mass. 150; *Fillebrown v. Hoar*, 124 Mass. 580; *Derry v. Flitner*, 118 Mass. 131; *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 475; *Wyman v. Leavitt*, 71 Maine, 227; *Ellis v. Cleveland*, 55 Vt. 358; *Phillips v. Dickerson*, 85 Ill. 11;

Hampton v. Jones, 58 Iowa, 317; *Renner v. Canfield*, 36 Minn. 90; *Lynch v. Knight*, 9 H. L. Cas. 577, 591, 595, 598; *The Notting Hill*, 9 P. D. 105; *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122.

The law of negligence in its special application to cases of accidents has received great development in recent years. The number of actions brought is very great. This should lead courts well to consider the grounds on which claims for compensation properly rest, and the necessary limitations of the right to recover. We remain satisfied with the rule that there can be no recovery for fright, terror, alarm, anxiety, or distress of mind, if these are unaccompanied by some physical injury; and if this rule is to stand, we think it should also be held that there can be no recovery for such physical injuries as may be caused solely by such mental disturbance, where there is no injury to the person from without. The logical vindication of this rule is, that it is unreasonable to hold persons who are merely negligent bound to anticipate and guard against fright and the consequences of fright; and that this would open a wide door for unjust claims, which could not successfully be met. These views are supported by the following decisions: *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222; *Mitchell v. Rochester Railway*, 151 N. Y. 107; *Ewing v. Pittsburg, Cincinnati, Chicago, & St. Louis Railway*, 147 Penn. St. 40; *Haile v. Texas & Pacific Railway*, 60 Fed. Rep. 557.

In the following cases, a different view was taken: *Bell v. Great Northern Railway*, 26 L. R. (Ir.) 428; *Purcell v. St. Paul City Railway*, 48 Minn. 134; *Fitzpatrick v. Great Western Railway*, 12 U. C. Q. B. 645. See also Beven, Negligence, 77 *et seq.*

It is hardly necessary to add that this decision does not reach those classes of actions where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as for example, in cases of seduction, slander, malicious prosecution or arrest, and some others. Nor do we include cases of acts done with gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind. *Lombard v. Lennox*, and *Fillebrown v. Hoar*, already cited. *Meagher v. Driscoll*, 99 Mass. 281.

In the present case, no such considerations entered into the rulings or were presented by the facts. The entry therefore must be,

*Exceptions sustained.*¹

¹ The following cases accord with *Spade v. Lynn Co.*, *Victoria Commissioners v. Coultas*, 13 App. Cas. 222; *Haile v. Tex. Co.*, 60 Fed. R. 557; *St. Louis Co. v. Bragg*, 69 Ark. 402; *Braun v. Craven*, 175 Ill. 401 (*semble*); *Kansas Co. v. Dalton*, 65 Kan. 661; *Morse v. Chesapeake Co.*, 117 Ky. 11; *Reed v. Ford* (Ky., 1908), 112 S. W. R. 600; *White v. Sander*, 168 Mass. 296; *Smith v. Postal Co.*, 174 Mass. 576; *Homans v. Boston Co.*, 180 Mass. 456 (*semble*); *Cameron v. N. E. Co.*, 182 Mass. 310 (*semble*); *Nelson v. Crawford*, 122 Mich. 466; *Crutcher v. Cleveland Co.*, 132 Mo. 311; *Deming v. Chicago Co.*, 80 Mo. Ap. 152; *Rawlings v. Wabash Co.*, 97 Mo. Ap. 515; *Ward v. West Co.*, 65 N. J. 383; *Porter v. Del. Co.*, 73 N. J. 405 (*semble*); *Mitchell v. Rochester Co.*, 151 N. Y. 107; *Newton v. N. Y. Co.*, 106 N. Y. Ap. Div. 415 (*semble*); *Prince v. Ridge*, 32 N. Y. Misc. Rep. 666, 667 (*semble*); *Hutchinson v. Stern*, 115 N. Y. Ap. Div. 791; *Miller v. Belt Co.*, 78 Oh. St. 309; *Ewing*

DULIEU v. WHITE AND SONS.

KING'S BENCH DIVISION, JUNE 5, 1901.

[*Law Reports* [1901], 2 *King's Bench*, 669.¹]

POINT OF LAW raised by pleadings.

The statement of claim was as follows:—

"1. The plaintiff is the wife of Arthur David Dulieu, who carries on the business of a licensed victualler at the Bonner Arms, Bonner Street, Bethnal Green, in the county of London.

"2. On July 20, 1900, the plaintiff was behind the bar of her husband's said public-house, she being then pregnant, when the defendants by their servant so negligently drove a pair-horse van as to drive it into the said public-house.

"3. The defendants were also negligent in entrusting the driving of the said horses and van to their said servant, who had no knowledge or skill in driving.

"4. The plaintiff in consequence sustained a severe shock, and was

v. Pittsburgh Co., 147 Pa. 40; *Linn v. Duquesne Co.*, 204 Pa. 551; *Huston v. Freemansburg*, 212 Pa. 543; *Hess v. Am. Co.* (Pa. 1908), 70 Atl. R. 294; *Taylor v. Atlanta Co.*, 78 S. Ca. 552; *Ford v. Schliessman*, 107 Wis. 479, 483 (*semble*).

The damages for an admitted tort to the person may be enhanced by proof of nervous shock caused by fright induced by the defendant's misconduct. *Melone v. Sierra Co.*, 151 Cal. 113; *Seger v. Barkhamstead*, 22 Conn. 290; *Masters v. Warren*, 27 Conn. 293; *Pittsburgh Co. v. Sponier*, 85 Ind. 165; *Newport Co. v. Gholson*, 10 Ky. L. Rep. 938; *City Co. v. Robinson*, 12 Ky. L. Rep. 555; *Warren v. Boston Co.*, 163 Mass. 484; *Homans v. Boston Co.*, 180 Mass. 456; *Cameron v. N. E. Co.*, 182 Mass. 310; *Smith v. St. Paul Co.*, 30 Minn. 169; *Butts v. Nat. Bank*, 99 Mo. Ap. 168; *Breen v. St. Louis Co.*, 102 Mo. Ap. 479; *Heiberger v. Mo. Co.* (Mo. Ap. 1908), 113 S. W. R. 730; *Buchanan v. West Co.*, 52 N. J. 265; *Consol. Co. v. Lamberton*, 59 N. J. 297; *Stokes v. Schlacter*, 66 N. J. 334; *Porter v. Del. Co.*, 73 N. J. 405; *O'Flaherty v. Nassau Co.*, 34 N. Y. Ap. Div. 74 (affirmed 165 N. Y. 624); *Pa. Co. v. Graham*, 63 Pa. 290; *Scott v. Montgomery*, 95 Pa. 444; *Ewing v. Pittsburgh Co.*, 147 Pa. 40 (*semble*); *Linn v. Duquesne Co.*, 204 Pa. 551 (*semble*); *Godeau v. Blood*, 52 Vt. 251; *Shutz v. Chicago Co.*, 73 Wis. 147; and even though the admitted tort is only an assault as distinguished from a battery. *Kline v. Kline*, 158 Ind. 602; *Williams v. Underhill*, 63 N. Y. Ap. Div. 223; *Leach v. Leach*, 11 Tex. Civ. Ap. 699.

In *Homans v. Boston Co.* *supra* the court said, through Holmes, C. J.: "As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. *Spade v. Lynn Co.*; *Smith v. Postal Co.*, 174 Mass. 576. But when there has been a battery and the nervous shock results from the same wrongful management as the battery, it is at least equally impracticable to go further and to inquire whether the shock comes through the battery or along with it. Even were it otherwise, recognizing as we must the logic in favor of the plaintiff when a remedy is denied because the only immediate wrong was a shock to the nerves, we think that when the reality of the cause is guaranteed by proof of a substantial battery of the person there is no occasion to press further the exception to general rules." See also *Spade v. Lynn Co.*, 172 Mass. 690 per Holmes, C. J.

Liability for frightening an Animal to Death. The doctrine of the principal case was carried so far in *Lee v. Burlington*, 113 Iowa, 356, that no recovery was allowed for the death of a horse from fright caused by the careless conduct of the defendant. But the opposite view prevailed in *Louisville Co. v. Melton* (Ala. 1908), 47 So. R. 1024 and *Conklin v. Thompson*, 29 Barb. 218. — Ed.

¹ Portions of the opinions are omitted. — Ed.

and is seriously ill, and on September 29, 1900, gave premature birth to a child.

"5. In consequence of the shock sustained by the plaintiff the said child was born an idiot.

"The plaintiff claims damages in respect of the aforesaid matters."

The statement of defence, after denying the allegations contained in the statement of claim, proceeded:—

"3. The defendants submit as a matter of law that the damages sought to be recovered herein are too remote, and that the statement of claim on the face thereof discloses no cause of action."

Cur. adv. vult.

KENNEDY, J. In this case the only question for the judgment of the court is in the nature of a demurrer.

The head of damage alleged in paragraph 5 was rightly treated by the plaintiff's counsel as untenable.

The defendant's counsel summed up his contention against the legal validity of the plaintiff's claim in the statement that no action for negligence will lie where there is no immediate physical injury resulting to the plaintiff.

This is an action on the case for negligence—that is to say, for a breach on the part of the defendant's servant of the duty to use reasonable and proper care and skill in the management of the defendant's van. In order to succeed, the plaintiff has to prove resulting damage to herself and "a natural and continuous sequence uninterruptedly connecting the breach of duty with the damage as cause and effect." *Shearman and Redfield, Negligence*, cited in *Beven, Negligence in Law*, 2nd ed. p. 7. In regard to the existence of the duty here, there can, I think, be no question. The driver of a van and horses in a highway owes a duty to use reasonable and proper care and skill so as not to injure either persons lawfully using the highway, or property adjoining the highway, or persons who, like the plaintiff, are lawfully occupying that property. His legal duty towards all appears to me to be practically identical in character and in degree. I understood the plaintiff's counsel to suggest that there might exist a higher degree of duty towards the plaintiff sitting in a house than would have existed had she been in the street. I am not satisfied that this is so. The wayfarer in the street, as it seems to me, has in law as much right of redress if he is injured in person or in property by the negligence of another as the man who is lawfully sitting on a side-wall or in an adjoining house. "The whole law of negligence assumes the principle of 'Volenti non fit injuria' not to be applicable," for reasons which Sir Frederick Pollock points out (*The Law of Torts*, by Sir F. Pollock, 6th ed. pp. 166, 167), in a passage which follows the quotation which I have just made. The legal obligations of the driver of

horses are the same, I think, towards the man indoors as to the man out of doors ; the only question here is whether there is an actionable breach of those obligations if the man in either case is made ill in body by such negligent driving as does not break his ribs but shocks his nerves.

Before proceeding to consider the objections to the maintenance of such a claim as that of the present plaintiff, it is, I think, desirable for clearness' sake to see exactly what are the facts which ought to be assumed for the purposes of the argument. We must assume in her favor all that can be assumed consistently with the allegations of the statement of claim. We must, therefore, take it as proved that the negligent driving of the defendants' servant reasonably and naturally caused a nervous or mental shock to the plaintiff by her reasonable apprehension of immediate bodily hurt, and that the premature childbirth, with the physical pain and suffering which accompanied it, was a natural and a direct consequence of the shock. I may just say in passing that I use the words "nervous" and "mental" as interchangeable epithets on the authority of the judgment of the Privy Council in *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222; but I venture to think "nervous" is probably the more correct epithet where terror operates through parts of the physical organism to produce bodily illness as in the present case. The use of the epithet "mental" requires caution, in view of the undoubted rule that merely mental pain unaccompanied by any injury to the person cannot sustain an action of this kind. Beven, *Negligence in Law*, 2nd ed. p. 77.

Now, these being the assumed facts, what are the defendants' arguments against the plaintiff's right to recover damages in this action ?

First of all, it is argued, fright caused by negligence is not in itself a cause of action — ergo, none of its consequences can give a cause of action. In *Mitchell v. Rochester Ry. Co.*, (1896) 151 N. Y. 107, the point is put thus : "That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright." With all respect to the learned judges who have so held, I feel a difficulty in following this reasoning. No doubt damage is an essential element in a right of action for negligence. I cannot successfully sue him who has failed in his duty of using reasonable skill and care towards me unless I can prove some material and measurable damage. If his negligence has caused me neither injury to property nor physical mischief, but only an unpleasant emotion of more or less transient duration, an essential constituent of a right of action for negligence is lacking. "Fear," as Sir Frederick Pollock has stated (*The Law of Torts*, 6th ed. p. 51), "taken alone falls short of being actual damage not because it is a

remote or unlikely consequence, but because it can be proved and measured only by physical effects." It may, I conceive, be truly said that, viewed in relation to an action for negligence, direct bodily impact is, without resulting damage, as insufficient a ground of legal claim as the infliction of fright. That fright — where physical injury is directly produced by it — cannot be a ground of action merely because of the absence of any accompanying impact appears to me to be a contention both unreasonable and contrary to the weight of authority.

[The learned judge then cited cases in which an action was held to lie, where the only physical impact did not accompany but was a consequence of the fright; also a case where there was nothing in the nature of impact and yet recovery was allowed.]

If impact be not necessary, and if, as must be assumed here, the fear is proved to have naturally and directly produced physical effects, so that the ill results of the negligence which caused the fear are as measurable in damages as the same results would be if they arose from an actual impact, why should not an action for those damages lie just as well as it lies where there has been an actual impact? It is not, however, to be taken that in my view every nervous shock occasioned by negligence and producing physical injury to the sufferer gives a cause of action. There is, I am inclined to think, at least one limitation. The shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself. A. has, I conceive, no legal duty not to shock B.'s nerves by the exhibition of negligence towards C., or towards the property of B. or C. The limitation was applied by Wright and Bruce, JJ., in the unreported case of *Smith v. Johnson & Co.*, referred to by Wright, J., at the close of his judgment in *Wilkinson v. Downton*, [1897] 2 Q. B. 57, at p. 61. In *Smith v. Johnson & Co.* (unreported), a man was killed by the defendant's negligence in the sight of the plaintiff, and the plaintiff became ill, not from the shock produced by fear of harm to himself, but from the shock of seeing another person killed. The court held that this harm was too remote a consequence of the negligence.¹ I should myself, as I have already indicated, have been inclined to go a step further, and to hold upon the facts in *Smith v. Johnson & Co.* that, as the defendant neither intended to affect the plaintiff injuriously nor did anything which could reasonably or naturally be expected to affect him injuriously, there was no evidence of any breach of legal duty towards the plaintiff or in regard to him of that absence of care according to the circumstances which Willes, J., in *Vaughan v. Taff Vale Ry. Co.*, (1860) 5 H. & N. 679, at p. 688, gave as a definition of negligence.

¹ See to the same effect *Phillips v. Dickerson*, 85 Ill. 11; *Cleveland Co. v. Stewart*, 24 Ind. Ap. 374; *Gadkins v. Runkle*, 25 Ind. Ap. 584; *Mahoney v. Dankwart*, 108 Iowa, 321; *Sperier v. Ott*, 116 La. 1087; *Renner v. Canfield*, 36 Minn. 90; *Buckman v. Gr. N. Co.*, 76 Minn. 373; *Sanderson v. Gr. N. Co.*, 88 Minn. 162; *Gosa v. So. Ry.*, 67 S. Ca. 347; *Gulf Co. v. Overton* (Tex. 1908), 110 S. W. R. 736. — ED.

In order to illustrate my meaning in the concrete, I say that I should not be prepared in the present case to hold that the plaintiff was entitled to maintain this action if the nervous shock was produced, not by the fear of bodily injury to herself, but by horror or vexation arising from the sight of mischief being threatened or done either to some other person, or to her own or her husband's property, by the intrusion of the defendants' van and horses. The cause of the nervous shock is one of the things which the jury will have to determine at the trial.

It remains to consider the second and somewhat different form in which the defendants' counsel put his objection to the right of the plaintiff to maintain this action. He contended that the damages are too remote, and relied much upon the decision of the Privy Council in *Victorian Railways Commissioners v. Coultas*, 13 App. Cas. 222.

The principal ground of their judgment is formulated in the following sentence: "Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot under such circumstances, their Lordships think, be considered a consequence which, in the ordinary course of things, would flow from the negligence of the gate-keeper."

Why is the accompaniment of physical injury essential? For my own part, I should not like to assume it to be scientifically true that a nervous shock which causes serious bodily illness is not actually accompanied by physical injury, although it may be impossible, or at least difficult, to detect the injury at the time in the living subject. I should not be surprised if the surgeon or the physiologist told us that nervous shock is or may be in itself an injurious affection of the physical organism. Let it be assumed, however, that the physical injury follows the shock, but that the jury are satisfied upon proper and sufficient medical evidence that it follows the shock as its direct and natural effect, is there any legal reason for saying that the damage is less proximate in the legal sense than damage which arises contemporaneously? "As well might it be said" (I am quoting from the judgment of Pales, C. B., 26 L. R. Ir. at p. 439) "that a death caused by poison is not to be attributed to the person who administered it because the mortal effect is not produced contemporaneously with its administration." Remoteness as a legal ground for the exclusion of damage in an action of tort means, not severance in point of time, but the absence of direct and natural causal sequence—the inability to trace in regard to the damage the "propter hoc" in a necessary or natural descent from the wrongful act. As a matter of experience, I should say that the injury to health which forms the main ground of damages in actions of negligence, either in cases of railway accidents or in running-down cases, frequently is proved, not as a concomitant of the occurrence, but as one of the sequelæ.

[As to *Mitchell v. Rochester Ry. Co.*, 151 N. Y. 107, cited by defendant.] Shortly, the facts there were that the plaintiff, whilst waiting for a tram-car, was nearly run over by the negligent management of the defendant's servant of a car drawn by a pair of horses, and owing to terror so caused fainted, lost consciousness, and subsequently had a miscarriage and consequent illness.

It may be admitted that the plaintiff in this American case would not have suffered exactly as she did, and probably not to the same extent as she did, if she had not been pregnant at the time; and no doubt the driver of the defendants' horses could not anticipate that she was in this condition. But what does that fact matter? If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

[After commenting on the opinion in *Spade v. Lynn & Boston R. R.*, 168 Mass. 285.]

Naturally one is diffident of one's opinion when one finds that it is not in accord with those which have been expressed by such judicial authorities as those to which I have just referred. But certainly, if, as is admitted, and I think justly admitted, by the Massachusetts judgment, a claim for damages for physical injuries naturally and directly resulting from nervous shock which is due to the negligence of another in causing fear of immediate bodily hurt is in principle not too remote to be recoverable in law, I should be sorry to adopt a rule which would bar all such claims on grounds of policy alone, and in order to prevent the possible success of unrighteous or groundless actions. Such a course involves the denial of redress in meritorious cases, and it necessarily implies a certain degree of distrust, which I do not share, in the capacity of legal tribunals to get at the truth in this class of claims. My experience gives me no reason to suppose that a jury would really have more difficulty in weighing the medical evidence as to the effects of nervous shock through fright, than in weighing the like evidence as to the effects of nervous shock through a railway collision or a carriage accident, where, as often happens, no palpable injury, or very slight palpable injury, has been occasioned at the time.

I have now, I think, dealt with the authorities and the arguments upon which the defendants rely, and I have done so at greater length than I should have wished to do but for the general interest of the points involved and the difficulties which the conflict of authorities undoubtedly present. In this conflict I prefer, as I have already indicated, the two decisions of the Irish courts. They seem to me to constitute strong and clear authorities for the plaintiff's contention. It was suggested on the part of the defendants that the applicability

of the judgment in *Bell v. Great Northern Company of Ireland*, 26 L. R. Ir. 428, is affected by the fact that the female in that action was a passenger on the defendant's railway, and as such had contractual rights. It appears to me that in the circumstances this fact can make no practical difference whatever. In the Irish case there was no special contract, no notice to the railway company, when they accepted her as a passenger, that she was particularly delicate, or peculiarly nervous or liable to fright. The contractual duty existed, as it often does exist, concurrently with the duty apart from contract; but the one is in such circumstances practically coextensive with the other in the rights which it gives and the corresponding liabilities which it imposes.

I hold that, if on the trial of this action the jury find the issues left to them as the jury found them in *Bell v. Great Northern Railway Company of Ireland*, 26 L. R. Ir. 428, after the direction of Andrews, J., which was approved by the Exchequer Division, the plaintiff will have made out a good cause of action.

PHILLIMORE, J.

I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B. — as by terrifying B. — and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind.

I think there is some assistance to be got from the cases where fear of impending danger has induced a passenger to take means of escape which have in the result proved injurious to him, and where the carrier has been held liable for these injuries, as in *Jones v. Boyce*, 1 Stark. 493.

[The learned judge thought it possible that he might have come to the same conclusion as that arrived at in *Victorian Railway Commissioners v. Coultas*, though not for the reasons which have prominence in the judgment. He also thought that he should have come to the same decision as the Massachusetts court in *Spade v. Lynn & Boston R. R.*; but that he should not have expressed it in such broad and sweeping language.]

In the case before us the plaintiff, a pregnant woman, was in her house. It is said that she was not the tenant in possession and could not maintain trespass *quare clausum fregit* if this had been a direct act of the defendant and not of his servant (as it was). This is true: her husband was in possession. But none the less it was her home, where she had a right, and on some occasions a duty, to be; and it seems to me that if the tenant himself could maintain an action, his wife or child could do likewise. It is averred that by reason of the

careless driving of the defendants' servant a pair-horse van came some way into the room, and so frightened her that serious physical consequences thereby befell her. If these averments be proved, I think that there was a breach of duty to her for which she can have damages. The difficulty in these cases is to my mind not one as to the remoteness of the damage, but as to the uncertainty of there being any duty. Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference. The learned counsel for the plaintiff has put it that every link is physical in the narrow sense. That may be or may not be. For myself, it is unimportant.

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*Judgment for plaintiff.*¹

¹ The following cases accord with *Dulieu v. White*: *Pullman Co. v. Lutz* (Ala. 1908) 44 So. R. 675 (*semble*); *Sloane v. So. Co.*, 111 Cal. 668; *Watson v. Dilts*, 116 Iowa, 249; *Cowan v. Tel. Co.*, 122 Iowa, 377, 382 (*semble*); *Purcell v. St. Paul Co.*, 48 Minn. 134, 138; *Lesch v. Gr. N. Co.*, 97 Minn. 503; *Watkins v. Kaolin Co.*, 131 N. Ca. 536; *Taber v. Seaboard Co.* (N. Ca. 1908), 62 S. E. R. 311; *Simone v. R. I. Co.*, 28 R. I. 186; *Mack v. South Co.*, 52 S. Ca. 323; *Hill v. Kimball*, 76 Tex. 210; *Gulf Co. v. Haytor*, 93 Tex. 239; *Yoakum v. Kroeger* (Tex. Civ. Ap. 1894), 27 S. W. R. 953; *St. Louis Co. v. Murdock* (Tex. Civ. Ap. 1909), 116 S. W. R. 139; *Fitzpatrick v. Gr. W. Co.*, 12 Up. Can. Q. B. 645; *Bell v. Gr. N. Ry.*, 26 L. R. Ir. 423; *Cooper v. Caledonia Co.* (Court of Sess., June 14, 1902), 4 F. 880.

See also *Beven*, *Negligence* (3d ed.), 66-72; *Sedgwick*, *Damages* (8th ed.), 642, 643, and an excellent article by *Francis H. Bohlen*, 41 *Am. L. Reg. & Rev.* 141.

MENTAL ANGUISH CAUSED BY NEGLIGENCE IN TRANSMISSION OF TELEGRAMS. — In a few states the addressee is allowed to recover damages for mental anguish resulting from the negligent failure of a telegraph company to make seasonable delivery of a message. *Mentzer v. Western Co.*, 93 Iowa, 752; *Cowan v. Western Co.*, 122 Iowa, 377; *Hurlburt v. Western Co.*, 123 Iowa, 295; *Chapman v. Western Co.*, 90 Ky. 265; *Western Co. v. Van Cleave*, 107 Ky. 464; *Western Co. v. Fisher*, 107 Ky. 513; *Graham v. Western Co.*, 109 La. 1069; *Barnes v. Western Co.*, 27 Nev. 438 (*semble*); *Thompson v. Western Co.*, 106 N. Ca. 549; *Young v. Western Co.*, 107 N. Ca. 370; *Bryan v. Western Co.*, 133 N. Ca. 603; *Wood v. Western Co.*, (N. Ca. 1908) 61 S. E. 653; *Hellams v. Western Co.*, 70 S. Ca. 83 (*statutory*); *Capers v. Western Co.*, 71 S. Ca. 29; *Wadsworth v. Western Co.*, 86 Tenn. 695; *Railroad v. Griffin*, 92 Tenn. 694; *So. Rekle v. Western Co.*, 55 Tex. 308; *Stewart v. Western Co.*, 66 Tex. 580; *Western Co. v. Beringer*, 84 Tex. 38.

But the weight of authority is against such recovery. *Chace v. Western Co.*, 44 Fed. R. 554; *Crawley v. Western Co.*, 47 Fed. R. 544; *Tyler v. Western Co.*, 54 Fed. R. 634; *Western Co. v. Wood*, 57 Fed. R. 471; *Gahan v. Western Co.*, 59 Fed. R. 433; *Stansell v. Western Co.*, 107 Fed. R. 668; *Western Co. v. Sklan*, 126 Fed. R. 295; *Rowan v. Western Co.*, 149 Fed. R. 550; *Blount v. Western Co.*, 126 Ala. 105; *Western Co. v. Krichbaum*, 132 Ala. 535; *Western Co. v. Bocker*, 138 Ala. 484; *Western Co. v. Waters*, 139 Ala. 652; *Peay v. Western Co.*, 64 Ark. 538; *Russell v. Western Co.*, 3 Dak. 315; *Internat. Co. v. Saunders*, 32 Fla. 434; *Chapman v. Western Co.*, 88 Ga. 763; *Giddens v. Western Co.*, 111 Ga. 824; *Western Co. v. Haltom*, 71 Ill. Ap. 63; *Western Co. v. Ferguson*, 157 Ind. 64 (overruling *Reese v. Western Co.*, 123 Ind. 294); *West v. Western Co.*, 39 Kan. 93 (*semble*); *Cole v. Gray*, 70 Kan. 705; *Francis v. Western Co.*, 58 Minn. 252; *Western Co. v. Rogers*, 68 Miss. 748; *Duncan v. Western Co.* (Miss. 1908), 47 So. R. 552; *Connell v. Western Co.*, 116 Mo. 34; *Newman v. Western Co.*, 54 Mo. Ap. 434; *Curtin v. Western Co.*, 13 N. Y. Ap. Div. 253; *Morton v. Western Co.*, 53 Oh. St. 431; *Butner v. Western Co.*, 2 Okla. 234; *Lewis v. Western Co.*, 57 S. Ca. 325 (law changed by statute in 1900, *Capers v. Western Co.*, 71 S. Ca. 29); *Connelly v. Western Co.*, 100 Va. 51; *Davis v. Western Co.*, 46 W. Va. 48; *Summersfield v. Western Co.*, 87 Wis. 1; *Koerber v. Patek*, 123 Wis. 453, 464 (*semble*).

See, also, the thoughtful discussion of this question in *Burdick*, *Torts* (2d ed.), 102-104. — *Ed.*

SECTION II

Battery.

COLE v. TURNER.

AT NISI PRIUS, CORAM HOLT, C. J., EASTER TERM, 1704.

[Reported in 6 *Modern Reports*, 149.]

HOLT, C. J., upon evidence in trespass for assault and battery, declared, —

First, That the least touching of another in anger is a battery.

Secondly, If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other gently, it will be no battery.¹

Thirdly, If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery.

GIBBONS v. PEPPER.

IN THE KING'S BENCH, EASTER TERM, 1695.

[Reported in 1 *Lord Raymond*, 88.]

TRESPASS, assault, and battery. The defendant pleads that he rode upon a horse in the king's highway, and that his horse, being affrighted, ran away with him, so that he could not stop the horse; that there were several persons standing in the way, among whom the plaintiff stood; and that he called to them to take care, but that, notwithstanding, the plaintiff did not go out of the way, but continued there; so that the defendant's horse ran over the plaintiff against the will of the defendant; *quæ est eadem transgressio, etc.* The plaintiff demurred. And Serjeant *Darnall*, for the defendant, argued that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*.

Northey, for the plaintiff, said, that in all these cases the defendant confessed a battery, which he afterwards justified; but in this case he justified a battery which is no battery. Of which opinion was the whole court; for if I ride upon a horse, and J. S. whips the horse so that he

¹ *Kerifford's Case*, Clayt. 22 pl. 38 *Accord*. See, also, *Steinman v. Balt. Co.* (Md. 1908), 71 A. 517; *Courtney v. Kneib*, 131 Mo. Ap. 24. — ED.

runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not I. But if I by spurring was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B., and with it strikes C., A., is the trespasser, and not B. And, *per curiam*, the defendant might have given this justification in evidence, upon the general issue pleaded. And therefore judgment was given for the plaintiff.

HALL v. FEARNLEY.

IN THE QUEEN'S BENCH, NOVEMBER 28, 1842.

[Reported in 3 Queen's Bench Reports, 919.]

TRESPASS for driving defendant's cart and horse with great violence against plaintiff, and thereby knocking him down, bruising, and wounding him, &c.

Plea: Not guilty.

On the trial before Wightman, J., at the Middlesex sittings in Hilary term, 1842, it was proved that the plaintiff was walking on a narrow part of the pavement in a public street, where there was a considerable curvature in it. The defendant was driving a cart in the road near the pavement, at the edge of which the plaintiff was walking. The case for the plaintiff was that there was want of due care on the part of the defendant, who had driven so close to the pavement as to knock the plaintiff down, and run over and break his leg. The defendant endeavored to show that the plaintiff had slipped from the curb-stone at the moment when the cart was passing, and had so got his leg under the wheel. The defendant called no witnesses. Wightman, J., told the jury that the question for them was, whether the injury was occasioned by unavoidable accident, or by the defendant's default; and that, if they thought the plaintiff had accidentally slipped off the pavement as the defendant's cart was passing, and had been run over in consequence of such accident, they ought to find for the defendant. Verdict for defendant.

In the same term Crowder obtained a rule *nisi* for a new trial on the ground that the judge had misdirected the jury, by telling them that, on the issue, if the injury was accidental, the defendant was entitled to a verdict.

Knowles now showed cause. The jury have in effect negatived all fault on the part of the defendant. This was an inevitable accident, as in *Gibbons v. Pepper*, where the defendant's horse ran away with the rider, and struck the plaintiff, and the court held it to be no trespass, and therefore properly evidence under not guilty. The new rules of pleading make no alteration in pleadings for trespass to the person;

and the case, therefore, stands on the old forms of pleading. This was in fact no assault or battery at all; for to constitute one some degree of negligence is always necessary. 3 Starkie on Evidence, 1119 (3d ed.). Gough v. Bryan¹ is to the same effect. There a special plea, alleging collision by the improper driving of the plaintiff himself, and concluding to the country, was held to be bad as amounting to the general issue. Griffin v. Parsons² shows that a seizure of the person is not necessarily an assault, but that the *animus* with which the act was done is material. It is at all events evidence in mitigation. [LORD DENMAN, C. J. If the plaintiff has suffered damage by a trespass not justified, the defendant should pay the whole amount, without inquiry into the question of *animus*. The case would be different if the defendant was not a voluntary agent. So it may be different where an action on the case for negligence is brought, and the negligence is denied; there negligence is the fact in issue.]

Crowder (with whom was *H. S. Cooper*), contra.³

LORD DENMAN, C. J. The authorities show that if the accident had resulted entirely from a superior agency, that would have been a defence, and might have been proved under the general issue; but a defence admitting that the accident resulted from an act of the defendant would not have been so provable.

COLERIDGE, J. Any defence which admits the trespass complained of to be the act of the defendant must be pleaded specially.

WIGHTMAN, J. The act of the defendant was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*. It was there agreed that an involuntary act might be a defence on the general issue. The decision, indeed, turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover.

*Rule absolute for a new trial.*⁴

HOLMES AND WIFE v. MATHER.

IN THE EXCHEQUER, JUNE 24, 1875.

[Reported in *Law Reports*, 10 *Exchequer*, 261.]

THE first count of the declaration alleged that the female plaintiff was passing along a highway, and the defendant so negligently drove a

¹ 2 M. & W. 770.

² 1 Selw. N. P. (13th ed.) 42.

³ The argument for the plaintiff is omitted. — Ed.

⁴ *Knapp v. Salisbury*, 2 Camp. 500; *Boas v. Litton*, 5 C. & P. 409; *Cotterill v. Starkey*, 8 C. & P. 691 *Accord*. — Ed.

carriage and horses in the highway that they ran against her and threw her down, whereby she and the male plaintiff were damaged.

The second count alleged that the defendant drove a carriage with great force and violence against the female plaintiff and wounded her, whereby, &c.

Plea, not guilty, and issue thereon.

At the trial before Field, J., at the spring assizes for Durham, 1875, the following facts were proved: In July, 1874, the defendant kept two horses at a livery stable in North Shields, and wishing to try them for the first time in double harness, had them harnessed together in his carriage. At his request a groom drove, the defendant sitting on the box beside him. After driving for a short time, the horses, being startled by a dog which suddenly rushed out and barked at them, ran away, and became so unmanageable that the groom could not stop them, though he could to some extent guide them. The groom begged the defendant to leave the management to him, and the defendant accordingly did not interfere. The groom succeeded in turning the horses safely round several corners, and at last guided them into Spring Terrace, at the end of which and at right angles runs Albion Street, a shop in Albion Street being opposite the end of Spring Terrace. When they arrived at the end of Spring Terrace, the horses made a sudden swerve to the right, and the groom then pulled them more to the right, thinking that was the best course, and tried to guide them safely round the corner. He was unable to accomplish this, and the horses were going so fast that the carriage was dashed against the palisades in front of the shop; one of the horses fell, and at the same time the female plaintiff, who was on the pavement near the shop, was knocked down by the horses and severely injured. The jury stopped the case before the close of the evidence offered on the defendant's part, and said that in their opinion there was no negligence in any one. The plaintiff's counsel contended that since the groom had given the horses the direction which guided them against the female plaintiff, that was a trespass which entitled the plaintiffs to a verdict on the second count.

The verdict was entered for the defendant, leave being reserved to the plaintiffs to move to enter it for them for £50 on the second count, the court to be at liberty to draw inferences of fact, and to make any amendment in the pleadings necessary to enable the defendant to raise any defence that ought to be raised.

Herschell, Q. C., having obtained a rule *nisi* to enter the verdict for the plaintiffs for £50, pursuant to leave reserved, on the ground that, upon the facts proved, the plaintiffs were entitled to a verdict on the trespass count,

C. Russell, Q. C., and *Crompton*, for the defendant, showed cause.

Herschell, Q. C., and *Gainsford Bruce*, in support of the rule. But for the act of the groom in directing the horses on to the plaintiff, they would have run into the shop, and the plaintiff would have escaped.

The groom may have been doing better for himself and the defendant in avoiding the shop, but that does not justify him in guiding the horse on to the plaintiff. That direction having been given by the immediate act of the driver, an action of trespass lies: *Leame v. Bray*.¹ There the defendant accidentally, and not wilfully, drove his carriage against the plaintiff's carriage, and the question being whether the proper remedy was trespass or case, it was held that the plaintiff had rightly brought trespass. Grose, J., said: "Looking into all the cases from the Year Book in the 21 Hen. 7, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally or by misfortune, yet he is answerable in trespass." And Lord Ellenborough says: "If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern. It is immaterial whether the injury be wilful or not." This was followed and approved in *M'Laughlin v. Pryor*.² It is not disputed that the groom was doing all he could to stop the horses, but as he still retained some control over them, the injury was the immediate result of his act. Herein lies the distinction between the present case and *Hammack v. White*,³ where the defendant had no control whatever over the horse, and did all in his power to prevent him going where he did. Here the driver exercised control so far as to pull them away from one direction into another, which took them on to the plaintiff.

[BRAMWELL, B. He was trying to divert them from that direction, but failed. It is not as if he had said, "I must either drive into the shop or on to the plaintiff, and I'll do the latter."]

In *Hammack v. White*³ there was no count in trespass, and the present point was not taken.⁴

BRAMWELL, B. I am inclined to think, upon the authorities, that the defendant is in the same situation as the man driving; but, without deciding that question, I assume, for the purposes of the opinion I am about to express, that he is as much liable as if he had been driving.

Now, what do we find to be the facts? The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavors to do what is the best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant, who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress or got into her eye, and so injured

¹ 3 East, 593, 599.

² 4 Man. & G. 48.

³ 11 C. B. (N. S.) 588; 31 L. J. (C. P.) 129.

⁴ The argument for the plaintiff is abridged, and the argument for the defendant is omitted. — Ed.

it. It seems manifest that, under such circumstances, she could not maintain an action. For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid. I think the present action not to be maintainable.

That is the general view of the case. Now I will put it a little more specifically, and address myself to the argument of Mr. Herschell. Here, he says, if the driver had done nothing, there is no reason to suppose this mischief would have happened to the woman; but he did give the horses a pull, or inclination, in the direction of the plaintiff, — he drove them there. It is true that he endeavored to drive them further away from the place by getting them to turn to the right, but he did not succeed in doing that. The argument, therefore, is, if he had not given that impulse or direction to them, they would not have come where the plaintiff was. Now, it seems to me that argument is not tenable, and I think one can deal with it in this way. Here, as in almost all cases, you must look at the immediate act that did the mischief, at what the driver was doing before the mischief happened, and not to what he was doing next before what he was then doing. If you looked to the last act but one, you might as well argue that if the driver had not started on that morning, or had not turned down that particular street, this mischief would not have happened.

I think the proper answer is, you cannot complain of me unless I was immediately doing the act which did the mischief to you. Now the driver was not doing that. What I take to be the case is this: he did not guide the horses upon the plaintiff; he guided them away from her, in another direction; but they ran away with him, upon her, in spite of his effort to take them away from where she was. It is not the case where a person has to make a choice of two evils, and singles the plaintiff out, and drives to the spot where she is standing. That is not the case at all. The driver was endeavoring to guide them indeed, but he was taken there in spite of himself. I think the observation made by my Brother Pollock during the argument is irresistible, that if Mr. Herschell's contention is right, it would come to this: if I am being run away with, and I sit quiet and let the horses run wherever they think fit, clearly I am not liable, because it is they, and not I, who guide them; but if I unfortunately do my best to avoid injury to myself and other persons, then it may be said that it is my act of guiding them that brings them to the place where the accident happens. Surely it is impossible.

As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper

form of action if it were wrongful. That is the effect of the decisions. In *Sharrod v. London and North Western Ry. Co.*,¹ the master was not present. In *M'Laughlin v. Pryor* ² the defendant was present, and was supposed to be taking part in the control of the animals. In *Leame v. Bray* ³ there was an act of direct force *vi et armis*, and there was negligence. I think, therefore, that our judgment should be for the defendant.

I think I could distinguish the case cited from the Year Book, but I will only say that there the defendant let out animals, liable to stray, whether frightened or not, in a place not inclosed, and without anybody to keep them in bounds.

CLEASBY, B. I would only add a word as to a point on which my Brother Bramwell has not given judgment, and that is this. This is not a case where the act that is done must be justified, as where a man does a particular thing to avoid something else, but it is a case where it must be shown that it was the act of the defendant himself. I sum up all in these words: in my opinion, the horses were not driven there by the defendant's servant, but they went there in spite of him, so far as he directed them at all.

I want to say one other word. In my opinion it is not clear that the act was the act of the master. To obtain a true test, we must look at all the circumstances, and particularly at the position of things where persons are placed in a peculiar situation of danger. Here I understand the case to be this: the master not having the same capacity for managing the horses, and being perhaps alarmed and anxious to interfere, the servant says, "Leave it to me, do not take any part." The master complies. That would absolve him as far as any question of personal negligence is concerned; and at that moment I think the act of the servant ceased to be the act of the master. I think, in support of that, I need only read this passage from the judgment of Parke, B., in *Sharrod v. London and North Western Ry. Co.*,⁴ where he says: "In all cases where a master gives the direction and control over a carriage, or animal, or chattel to another rational agent, the master is only responsible in an action on the case for want of skill or care of the agent, — no more."

POLLOCK, B., concurred.

*Rule discharged.*⁵

¹ 4 Ex. 580.

² 4 Man. & G. 48.

³ 3 East, 593, 599.

⁴ 4 Ex., at p. 586.

⁵ *Stendle v. Rentchler*, 64 Ill. 161; *Vincent v. Stinehour*, 7 Vt. 62 *Accord*.

See, to the same effect, *Davis v. Saunders*, 2 Chitty, 639; *Goodman v. Taylor*, 5 C. & P. 410, where the actions were for injuries to personal property. — ED.

INNES *v.* WYLIE.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., FEBRUARY 22, 1844.

[*Reported in 1 Carrington & Kirwan, 257.*]

ASSAULT. Plea:¹ Not guilty.

It further appeared that the plaintiff, on the 30th of November, 1843, went to a dinner of the society at Radley's Hotel, and was prevented by a policeman named Douglas from entering the room; and it was proved by the policeman that he acted by order of the defendants.

With respect to the alleged assault, the policeman said, "The plaintiff tried to push by me into the room, and I prevented him;" but some of the other witnesses stated that the plaintiff tried to enter the room, and was pushed back.

Erle addressed the jury for the defendant. There is no assault here. The policeman, who must best know what was done, says that the plaintiff tried to push into the room, and he prevented him; and preventing a person from pushing into a room is no assault, the assault, if any, being rather on the other side.

LORD DENMAN, C. J. (in summing up). You will say, whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive, like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, Did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the door-way passive, and not move at all?

Verdict for the plaintiff. Damages, 40s.

COWARD *v.* BADDELEY.

IN THE EXCHEQUER, APRIL 19, 1859.

[*Reported in 4 Hurlstone & Norman, 478.*]

DECLARATION: That the defendant assaulted and beat the plaintiff, gave him in custody to a policeman, and caused him to be imprisoned in a police-station for twenty-four hours, and afterwards to be taken in custody along public streets before metropolitan police magistrates.

Pleas: First, Not guilty; third, That the plaintiff, within the Metropolitan Police District, assaulted the defendant, and therefore the defendant gave the plaintiff into custody to a police officer, who had

¹ The statement of the case has been abridged. — Ed.

view of the assault, in order that he might be taken before magistrates and dealt with according to law, &c.

Whereupon issue was joined.

At the trial before Bramwell, B., at the London sittings in last Hilary term, the plaintiff proved that, on the night of the 31st of October, he was passing through High Street, Islington, and stopped to look at a house which was on fire. The defendant was directing a stream of water from the hose of an engine on the fire. The plaintiff said, "Don't you see you are spreading the flames? Why don't you pump on the next house?" He went away, and then came back and repeated these words several times, but did not touch the defendant. The defendant charged the plaintiff with assaulting him, and gave him into the custody of a policeman who was standing near.

The defendant swore that, on being interrupted by the plaintiff, he told him to get out of the way and mind his own business; that the plaintiff came up to him again, seized him by the shoulder, violently turned him round, exposed him to danger, and turned the water off the fire.

The learned judge told the jury that the question was whether an assault and battery had been committed; and he asked them, first, whether the plaintiff laid hands on the defendant; and, secondly, whether he did so hostilely. The jury found that the plaintiff did lay hands on the defendant, intending to attract his attention. Whereupon the learned judge ordered the verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that he had wrongly directed the jury in telling them that, to find the issue on the third plea for the defendant, they must find that the plaintiff laid his hands upon him with a hostile intention.

Shee, Serjt., in the same term, having obtained a rule *nisi* accordingly,

Beasley now showed cause. The question is, whether the intention of the plaintiff is material to be considered in order to determine whether there was an assault and battery. In *Rawlings v. Till*,¹ Parke, B., referring to *Wiffin v. Kincard*,² where it was held that a touch given by a constable's staff does not constitute a battery, pointed out, as the ground of that decision, that there the touch was merely to engage the plaintiff's attention. [MARTIN, B. Suppose two persons were walking near each other, and one turned round, and in so doing struck the other: surely that would not be a battery. POLLOCK, C. B. There may be a distinction for civil and criminal purposes. CHANNELL, B. It was necessary to prove an indictable assault and battery in order to sustain the plea.] The maxim, *Actus non facit reum nisi mens sit rea*, applies. He referred also to *Purcell v. Horn*; ³ Archbold's Criminal Law, p. 524 (12th ed.); *Scott v. Shepherd*.⁴

¹ 3 M. & W. 28.

² 8 A. & E. 602.

³ 2 B. & P. N. R. 411.

⁴ 2 W. Bl. 892.

Petersdorff, Serjt., and *Francis*, in support of the rule. The learned judge's direction was defective in introducing the word "hostile." In order to constitute an assault, it is enough if the act be done against the will of the party. There are several cases where it has been held that an assault has been committed where there was no intention to do the act complained of in a hostile way, as in the case of a prize-fight. *Rex v. Perkins*.¹ So a surgeon assisting a female patient to remove a portion of her dress. *Rex v. Rosinski*.² Here the plaintiff interfered with the defendant in the execution of his duty. In *Hawkins' Pleas of the Crown*, vol. i. p. 263, it is said, "Any injury whatever, be it never so small, being actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." [BRAMWELL, B. I think that the jostling spoken of must mean a voluntary jostling.]

POLLOCK, C. B. I am of opinion that the rule must be discharged. The jury found that what the plaintiff did was done with the intent to attract the attention of the defendant, not with violence to justify giving the plaintiff into custody for an assault. The defendant treated it as a criminal act, and gave the plaintiff into custody. We are called on to set aside a verdict for the plaintiff, on the ground that he touched the defendant. There is no foundation for the application.

MARTIN, B. I am of the same opinion. The assault and battery which the defendant was bound to establish means such an assault as would justify the putting in force the criminal law for the purpose of bringing the plaintiff to justice. It is necessary to show some act which justified the interference of the police officer. Touching a person so as merely to call his attention, whether the subject of a civil action or not, is not the ground of criminal proceeding. It is clear that it is no battery within the definition given by *Hawkins*.

CHANNELL, B. I am of the same opinion. Looking at the plea, it is obvious that it was not proved.

BRAMWELL, B., concurred.

Rule discharged.

¹ 4 C. & P. 587.

² Ry. & Moo. C. C. 19.

ORIGINAL WRIT.

[Registrum Brevium, folio 108, b.]

OSTENSURUS quare vi et armis quendam liquorem callidum super ipsum I apud N projecit, ita quod de vita ejus desperabatur et alia enormia, etc., ad grave damnum, etc. Casus erat hujusmodi præcedentis brevis: quædam mulier projecit super aliam mulierem ydromellum quod Anglice dicitur *Wort* quod erat nimis callidum.¹

DUBUC DE MARENTILLE v. JAMES OLIVER.

IN THE SUPREME COURT, NEW JERSEY, FEBRUARY TERM, 1808.

[Reported in 1 Pennington, 379.]

THIS was action of trespass, brought by the defendant in this court, against the plaintiff *in certiorari*. The state of demand charged the defendant below, that he unlawfully, forcibly, and with great violence, with a large stick, struck the horse of the plaintiff, on the public highway, which said horse was then before a carriage, in which the plaintiff was riding, on the said public highway, to the damage of the plaintiff fifty dollars. This cause was tried by a jury, and verdict and judgment for the plaintiff, \$15 damages. It was assigned for error that the suit was brought before the justice to recover damages for an assault and battery, when, by law, such an action cannot be supported before a justice of the peace.

PENNINGTON, J.² To attack and strike with a club, with violence, the horse before a carriage, in which a person is riding, strikes me as an assault on the person;³ and if so, the justice had no jurisdiction of the action.

¹ Pursell v. Horn, 8 A. & E. 602, 3 Nev. & P. 564; Central Co. v. Vanderhenk, 147 Ala. 546; Sloss Co. v. Salser (Ala. 1909), 48 So. R. 374 (*semble*); Birmingham Co. v. Grover (Ala. 1909), 48 So. R. 632 (*semble*); Munter v. Bande, 1 Mo. Ap. 484; Turner v. Degnon Co., 99 N. Y. Ap. Div. 135 *Accord*. Lord Denman said in the former case, p. 506: "I think a battery cannot mean merely an injury inflicted by an instrument held in the hand, *cominus*, as it were, but includes all cases where any party is struck by any missile thrown by another." Littledale said in the same case: "Unless we were to hold that throwing boiling water on a person is not a battery, the wounding a person with a ball from a pistol, under circumstances not amounting to a felony, would not be a battery." — Ed.

² A part of the case, relating to a point of practice, is omitted. — Ed.

³ Dodwell v. Burford, 1 Mod. 24; Hopper v. Reeve, 7 Taunt. 698; Spear v. Chapman, 8 Ir. L. R. 461; Burdick v. Worrall, 4 Barb. 596 (*semble*); Bull v. Colton, 22 Barb. 94; Clark v. Downing, 55 Vt. 259 *Accord*. But see Kirland v. State, 43 Ind. 146.

An injury to the clothes on one's back is a trespass on the person, Regina v. Day, 1 Cox, C. C. 207. So is the removal of an ulster from the plaintiff, Geraty v. Stern, 30 Hun, 426; or seizing anything in the plaintiff's hand, Scott v. State, 118 Ala. 115; Dyk v. De Young, 35 Ill. Ap. 138; Steinman v. Balt. Co., (Md. 1908) 71 Atl. R. 517, 518 (*semble*); Respublica v. De Longchamps, 1 Dall. 111; or cutting a rope connecting the plaintiff with his slave, State v. Davis, 1 Hill, S. Ca. 46. — Ed.

But if this is to be considered as a trespass on the property, unconnected with an assault on the person, I think that it was incumbent on the plaintiff below to state an injury done to the horse, whereby the plaintiff suffered damage; that he was in consequence of the blow bruised or wounded, and unable to perform service; or that the plaintiff had been put to expense in curing of him, or the like.¹ All the precedents of declarations for injuries done to domestic animals, as far as my recollection goes, are in that way; and I think, with good reason. Suppose a man, seeing a stranger's horse in the street, was to strike him with a whip, or a large stick, if you please, and no injury was to ensue, could the owner of the horse maintain an action for this act? I apprehend not. For these reasons, I incline to think, that this judgment ought to be reversed.

KIRKPATRICK, C. J. Concurred in the reversal.

Judgment reversed.

M. Williamson, for plaintiff.

REYNOLDS v. PIERSON AND OTHERS.

APPELLATE COURT, INDIANA, JUNE 5, 1902.

[29 *Indiana Appellate Court Reports*, 273.]

ROBY, J.² . . . It was averred in the complaint that appellant, in a rude and insolent manner, unlawfully assaulted the plaintiff with force and violence, and committed an assault and battery upon him, by reason of which he received injuries to his damage.

Answer, a general denial.

There is very little conflict in the evidence. The plaintiff, a man sixty-eight years of age engaged in business in the Union Stock Yards, in Indianapolis, was standing in one of the alley-ways of the Inter-State Stock Yards in said city. He was greeted as he came up by one Wm. O. Trotter, who addressed him as "Uncle John," took hold of his left arm or coat sleeve, shook him, and inquired, jokingly, whether he had come over to the new yards to run them out of business. There were a number of other parties present. Appellant, who was a large man, weighing about 225 pounds, thirty-five years of age, came walking briskly down to the yards from the office building, and as he passed Trotter, who was still holding Pierson's arm or sleeve, appellant took hold of his arm and jerked and pulled him with sufficient force, so that Pierson, upon whose arm Trotter retained his hold, was thereby thrown and injured. Appellant passed on down the alley and did not at the time notice that Pierson was thrown or hurt.

¹ See *infra*, 49 n. 2, 4th edition.

² Only a part of the opinion of the court is given. — ED.

The appellant's claim is : That no intention to injure Pierson existed; that he was on good terms with both Pierson and Trotter. They—he and Trotter—were accustomed to the kind of greeting and sport appellant attempted to engage Trotter in. It was their usual and customary greeting; that the injury suffered by plaintiff was an extraordinary, unusual, and unnatural result, and not such as might have been reasonably expected from the act, and therefore not the proximate effect of the act complained of; that the injury was the result of a pure accident.

The facts shown are sufficient to condemn the habit of so-called "horse play" between grown men. The defence relied upon has been many times tersely expressed by younger people in the phrase, "I did n't mean to." Plaintiff was injured through no fault of his own. His right to be secure in person was violated. The appellant was responsible therefor. His act was the primary cause of the plaintiff's injury. The verdict of the jury is not, therefore, unsupported. The evidence also justified the legal conclusion that there was such a reckless disregard of consequences on the part of the appellant as to imply an intention to assault plaintiff. The evidence supplies grounds for inferring the constructive intent which makes a wrongful act wilful. There is no reason why the appellant might not have passed without interfering with the person of any one, and his failure to do so implies the willingness to inflict an injury which in fact he did inflict. *Mercer v. Corbin*,¹ *Peterson v. Haffner*.² Appellant took hold of Trotter, and by force applied to him, and through him communicated to the plaintiff, caused the plaintiff to be thrown and injured. In *Peterson v. Haffner*, *supra*, the medium or instrument by means of which the injury was inflicted was some mortar picked up and thrown. The character of the instrument used in committing an assault is immaterial, so far as the legal consequences thereof are concerned.

*Judgment affirmed.*³

¹ 117 Ind. 450, 453.

² 39 Ind. 130.

³ *Isham v. Dow*, 70 Vt. 588 (defendant shot and wounded a dog which rushed into the house and knocked down the plaintiff) *Accord*.

The mere keeping of a dog which bites the plaintiff is no battery. The Lord Derby, 17 Fed. R. 265. But the rule is otherwise by statute in Maine. *Carroll v. Marcoux*, 98 Me. 259. — ED.

SECTION III.

Imprisonment.

NOTE BY THORPE, C. J., 1848.

[Reported in *Year-Book of Assizes*, folio 104, placitum 85.]

THERE is said to be an imprisonment in any case where one is arrested by force and against his will, although it be on the high street or elsewhere, and not in a house, &c.¹

GENNER *v.* SPARKES.

IN THE KING'S BENCH, TRINITY TERM, 1704.

[Reported in 1 *Salkeld*, 79.²]

GENNER, a bailiff, having a warrant against Sparkes, went to him in his yard, and, being at some distance, told him he had a warrant, and said he arrested him. Sparkes, having a fork in his hand, keeps off the bailiff from touching him, and retreats into his house. And this was moved as a contempt. *Et per Curiam*. The bailiff cannot have an attachment, for here was no arrest nor rescous. Bare words will not make an arrest; but if the bailiff had touched him, that had been an arrest,³ and the retreat a rescous, and the bailiff might have pursued and broke open the house, or might have had an attachment or a rescous against him; but as this case is, the bailiff has no remedy, but an action for the assault; for the holding up of the fork at him when he was within reach, is good evidence of that.⁴

¹ *McNay v. Stratton*, 9 Ill. Ap. 215; *Price v. Bailey*, 66 Ill. 49; *Hildebrand v. McCrum*, 101 Ind. 61; *Smith v. State*, 7 Humph. 43; *Sorenson v. Dundas*, 50 Wis. 335 *Accord*.

Compare *Marshall v. Heller*, 55 Wis. 392. — Ed.

² 6 Mod. 173, s. c. — Ed.

³ *Anon.* 1 Vent. 306; *Anon.* 7 Mod. 8; *Whitehead v. Keyes*, 3 All. 495 *Accord*. — Ed.

⁴ If the bailiff, who has a process against one, says to him when he is on horseback or in a coach, "You are my prisoner; I have a writ against you," upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest, because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff laid hold of him. *Horner v. Battyn*, Bull. N. P. 62.

RUSSEN v. LUCAS.

AT NISI PRIUS, CORAM ABBOTT, C. J., FEBRUARY 19, 1824.

[Reported in 1 Carrington & Payne, 153.]

ACTION against the sheriff for an escape. The only point in dispute was, whether a person named Hamer was arrested by the sheriff's officer, and escaped.

The officer having the warrant went to the One Tun Tavern in Jermyn Street, where Hamer was sitting. He said: "Mr. Hamer, I want you." Hamer replied, "Wait for me outside the door, and I will come to you." The officer went out to wait, and Hamer went out at another door, and got away.

ABBOTT, C. J. Mere words will not constitute an arrest; and if the officer says, "I arrest you," and the party runs away, it is no escape; but if the party acquiesces in the arrest, and goes with the officer, it will be a good arrest. If Hamer had gone even into the passage with the officer, the arrest would have been complete; but, on these facts, if I had been applied to for an escape-warrant, I would not have granted it. *Nonsuit.*¹

WOOD v. LANE AND ANOTHER.

AT NISI PRIUS, CORAM TINDAL, C. J., DECEMBER 13, 1834.

[Reported in 6 Carrington & Payne, 774.]

TRESPASS and false imprisonment. Pleas: Not guilty; and leave and license.

It was proved by a member of the plaintiff's family that he was a flannel draper in Castle Street, Holborn, and that on the 3d of April he came home accompanied by the defendants, Cleaton and Lane; and that the plaintiff said Cleaton had arrested him at Mr. Sanders's, in Holborn; that the plaintiff's wife asked the defendant Lane, who was, in fact, clerk to Cleaton's attorney, if he had any authority, and he said he had; and being asked his name, said, "My name is Selby, of Chancery Lane." Lane made several inquiries about the plaintiff's property, and said he would give him time till eight o'clock in the evening; upon which the other defendant, Cleaton, said, "How can you do that? I will not allow you to give him any time at all." It was proved that, in fact, Mr. Selby had no bailable process against the plaintiff. A witness was also called, who proved that, in conversation with the defendant Lane on the subject, he said it was a foolish piece

¹ Hill v. Taylor, 50 Mich. 549; Powell v. Champion Co., 149 (?) N. Ca. — Accord. — ED.

of business; that Mr. Cleaton had caused him to do it; that he was very sorry for it, but he thought Mr. Cleaton would indemnify him. There was some uncertainty in the evidence of the conversation, whether the defendant Lane admitted or not that he had taken the plaintiff by the arm.

According to the evidence of Mr. Sanders, at whose house the transaction commenced, the plaintiff was bargaining with him for the sale of some goods, and had just made out the invoice, which was lying before him, when the defendant Cleaton came in alone, and asked the plaintiff several times to pay the amount he owed him, or some money on account. The plaintiff said he would not; upon which Cleaton went just outside the door, and returned immediately, followed by the defendant Lane, and pointing to the plaintiff, said, "This is the gentleman." The plaintiff tore up the invoice he had written, and threw it on the fire, and said, "I suppose I am to go with you." The answer given was, "Yes." The plaintiff and the two defendants went away together.

Talfourd, Serjt., for the defendant. No arrest has been proved. Sanders, who was present, says nothing of the laying hold of the plaintiff.

TINDAL, C. J. The question is, whether the plaintiff went voluntarily from Mr. Sanders's to his own house, or whether he went in consequence of the acts of the defendants. If you put your hand upon a man, or tell him he must go with you, and he goes, supposing you to have the power to enforce him, is not that an arrest? May you not arrest without touching a man?

White referred to the case of *Arrowsmith v. Le Mesurier*.¹

TINDAL, C. J. That is a case which has often been spoken of as going to the very extreme point; but in that case the jury found that the plaintiff went voluntarily with the officer. And in this case, if you can persuade the jury that the plaintiff went voluntarily, you may succeed.

Talfourd, Serjt., then addressed the jury for the defendants. There was no real compulsion. No writ was produced. It was only an endeavor by a manœuvre to make the plaintiff do what he ought, but would not, viz., pay the money which he owed.

TINDAL, C. J., in summing up, told the jury, that, if the plaintiff was acting as an unwilling agent at the time and against his own will, when he went to his own house from that of Sanders, it was just as much an arrest as if the defendants had forced him along.

*The jury found for the plaintiff. Damages, £10.*²

¹ 2 B. & P. N. R. 44.

² *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore*, Ry. & M. 321; *Peters v. Stanway*, 6 C. & P. 737; *Granger v. Hill*, 4 B. N. C. 212; *Warner v. Riddiford*, 4 C. B. N. S. 180 (criticising *Arrowsmith v. Le Mesurier*, 2 B. & P. N. R. 211) *Accord*.

To hold a man by the sleeve without professing to arrest him or leading him to believe he is not free to get away is not an imprisonment. *Macintosh v. Cohen*, 24 N. Zeal. L. R. 625. — Ed.

PIKE v. HANSON.

SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, DECEMBER
TERM, 1838.

[Reported in 9 New Hampshire Reports, 491.]

TRESPASS, for an assault and false imprisonment on the 1st day of July, A. D. 1837. The action was commenced before a justice of the peace. The defendants pleaded severally the general issue. It appeared in evidence that the defendants were selectmen of the town of Madbury for the year 1836; that they assessed a list of taxes upon the inhabitants of said town, among whom was the plaintiff, and committed it to Nathan Brown, collector of said town, for collection. Brown, after having given due notice to the plaintiff, being in a room with her, called upon her to pay the tax, which she declined doing until arrested. He then told her that he arrested her, but did not lay his hand upon her; and thereupon she paid the tax.

Upon this evidence the defendants objected that the action could not be maintained, because there was no assault.

It did not appear that the defendants had been sworn, as directed by the statute of January 4, 1833. A verdict was taken for the plaintiff, subject to the opinion of the court.

Hale, for the plaintiff. —, for the defendants.

WILCOX, J. . . .¹ But it is contended that in the present case there has been no assault committed, and no false imprisonment. Bare words will not make an arrest: there must be an actual touching of the body; or, what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto. *Genner v. Sparkes*. Where a bailiff, having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him. But if, on the bailiff's saying those words, he had fled, it had been no arrest, unless the bailiff had laid hold of him. *Homer v. Battyn*.² The same doctrine is held in other cases. *Russen v. Lucas & al.*; *Chinn v. Morris*; ³ *Pocock v. Moore*; ⁴ *Strout v. Gooch*; ⁵ *Gold v. Bissell*.⁶

Where, upon a magistrate's warrant being shown to the plaintiff, the latter voluntarily and without compulsion attended the constable who had the warrant to the magistrate, it was held there was no sufficient imprisonment to support an action. *Arrowsmith v. Le Mesurier*.⁷ But in this case there was no declaration of any arrest, and the warrant was in fact used only as a summons. And if the decision cannot be

¹ Part of the case, not relating to imprisonment, has been omitted. — Ed.

² Buller's N. P. 62.

³ 2 C. & P. 361.

⁴ Ry. & Moody, 321.

⁵ 8 Greenl. 126.

⁶ 1 Wend. 210.

⁷ 2 B. & P. N. R. 211

sustained upon this distinction, it must be regarded as of doubtful authority.

Starkie says that in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting, until actual violence be used. 3 Stark. Ev. 1113. This principle is reasonable in itself, and is fully sustained by the authorities above cited. Nor does it seem necessary that there should be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant; has the party in his presence and power: if the party so understands it, and in consequence thereof submits, and the officer, in execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, we think it is in law an arrest, although he did not touch any part of the body.

In the case at bar, it clearly appears that the plaintiff did not intend to pay the tax, unless compelled by an arrest of her person. The collector was so informed. He then proceeded to enforce the collection of the tax, — declared that he arrested her, — and she, under that restraint, paid the money. This is a sufficient arrest and imprisonment to sustain the action, and there must, therefore, be

*Judgment on the verdict.*¹

FOTHERINGHAM v. ADAMS EXPRESS CO.

IN THE UNITED STATES CIRCUIT COURT, EASTERN DISTRICT,
MISSOURI, SEPTEMBER 24, 1888.

[Reported in 36 Federal Reporter, 252.]

THAYER, J.² With reference to the motion for a new trial which has been filed in this case and duly considered, it will suffice to say, that I entertain no doubt that the jury were warranted in finding that plaintiff was unlawfully restrained of his liberty from about the 27th or 28th of October until the 10th of November following; that is to say, for a period of about two weeks. The testimony in the case clearly showed

¹ Johnson v. Tomkins, Baldw. C. C. 571, 601; Collins v. Fowler, 10 Ala. 859; Courtoy v. Dozier, 20 Ga. 369; Hawk v. Ridgway, 33 Ill. 473; Brushaber v. Stegemann, 22 Mich. 266; Josselyn v. McAllister, 25 Mich. 45; Moore v. Thompson (Mich. 1892), 52 N. W. R. 1000; Ahern v. Collins, 39 Mo. 145; Strout v. Gooch, 8 Greenl. 126; Mowry v. Chase, 100 Mass. 79; Emery v. Chesley, 18 N. H. 198; Browning v. Rittenhouse, 40 N. J. 230; Hebrew v. Pulis, 73 N. J. 621; Gold v. Bissell, 1 Wend. 210; Van Voorhees v. Leonard, 1 N. Y. Supreme Ct. R. 148; Searls v. Viets, 2 N. Y. Supreme Ct. R. 224; Limbeck v. Gerry, 15 N. Y. Misc. Rep. 663; Martin v. Houck, 141 N. Ca. 317; Huntington v. Shultz, Harp. 452; Mead v. Young, 2 Dev. & Batt. 521; Haskins v. Young, 2 Dev. & Batt. 527; Jones v. Jones, 13 Ired. 448; McCracken v. Ansley, 4 Strob. 1; Gunderson v. Struebing, 125 Wis. 173 Accord.

But see Cottam v. Oregon City, 98 Fed. R. 570, deciding that a submission to arrest rather than pay an illegal license fee is not an imprisonment. — Ed.

² A portion of the case, relating to damages, is omitted. — Ed.

that during that period he was constantly guarded by detectives employed by defendant for that purpose; that he was at no time free to come and go as he pleased; that his movements were at all times subject to the control and direction of those who had him in charge; that he was urged by them on several occasions to confess his guilt, and make known his confederates; and that he was subjected to repeated examinations and cross-examinations touching the robbery, of such character as clearly to imply that he was regarded as a criminal, and that force would be used to detain him if he attempted to assert his liberty. The jury in all probability found (as they were warranted in doing) that during the time plaintiff remained in company with the detectives, he was in fact deprived of all real freedom of action, and that whatever consent he gave to such restraint was an enforced consent, and did not justify the detention without a warrant. It is manifest that the court ought not to disturb the finding on that issue.

HERRING v. BOYLE.

IN THE EXCHEQUER, TRINITY TERM, 1834.

[*Reported in 1 Crompton, Meeson, & Roscoe, 377.*]

BOLLAND, B.¹ This was an action of trespass for assault and false imprisonment, brought by an infant by his next friend. The facts of the case were these: The plaintiff had been placed by his mother at the school kept by the defendant, and it appeared that she had applied to take him away. The schoolmaster very improperly refused to give him up to his mother, unless she paid an amount which he claimed to be due. The question is, whether it appears upon the judge's notes that there was any evidence of a trespass to go to the jury. I am of opinion that there was not, and, consequently, that this rule must be discharged. It has been argued on the part of the plaintiff that the misconduct of the defendant amounted to a false imprisonment. I cannot find anything upon the notes of the learned judge which shows that the plaintiff was at all cognizant of any restraint. There are many cases which show that it is not necessary, to constitute an imprisonment, that the hand should be laid upon the person; but in no case has any conduct been held to amount to an imprisonment in the absence of the party supposed to be imprisoned. An officer may make an arrest without laying his hand on the party arrested; but in the present case, as far as we know, the boy may have been willing to stay; he does not appear to have been cognizant of any restraint, and there was no evidence of any act whatsoever done by the defendant in his presence. I think that we cannot construe the refusal to the mother,

¹ Only the opinions of Bolland and Alderson, B B., are given. — Ed.

in the boy's absence, and without his being cognizant of any restraint. to be an imprisonment of him against his will; and, therefore, I am of opinion that the rule must be discharged.

ALDERSON, B. There was a total absence of any proof of consciousness of restraint on the part of the plaintiff. No act of restraint was committed in his presence; and I am of opinion that the refusal in his absence to deliver him up to his mother was not a false imprisonment. My brother Parke, who heard the rule moved, but who was not present at the argument, concurs in the opinion of the court.

*Rule discharged.*¹

BIRD v. JONES.

IN THE QUEEN'S BENCH, TRINITY VACATION, 1845.

[Reported in 7 Queen's Bench Reports, 742.]

THIS action was tried before Lord Denman, C. J., at the Middlesex sittings after Michaelmas term, 1843, when a verdict was found for the plaintiff.

In Hilary term, 1844, Thesiger obtained a rule *nisi* for a new trial, on the ground of misdirection.

In Trinity term, in the same year (June 5), Platt, Humfrey, and Hance showed cause, and Sir F. Thesiger, Solicitor-General, supported the rule.

The judgments sufficiently explain the nature of the case.

Cur. adv. vult.

In this vacation (9th July), there being a difference of opinion on the bench, the learned judges who heard the argument delivered judgment *seriatim*.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my Brother Patteson, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists.

This point is, whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly, and as I understand them, are in effect as follows:—

A part of a public highway was inclosed, and appropriated for spectators of a boat-race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but,

¹ See *Commonwealth v. Nickerson*, 5 All. 518. — Ed.

after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and during that time remained where he had thus placed himself.

These are the facts; and, setting aside those which do not properly bear on the question now at issue, there will remain these: that the plaintiff, being in a public highway and desirous of passing along it in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person and go in any other direction, at his free will and pleasure; and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much.

I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification.

And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom: it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power: it includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. Imprisonment (G), it is said: "Every restraint of the liberty of a free man will be an imprisonment." For this the authorities cited are 2 Inst. 482; Cro. Car. 209. But when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books the object was to point out that a prison was not necessarily what is commonly so called, a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of West

minster 2d,¹ *in prisona*, and says: "Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison." The passage in Cro. Car. 209, is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate-house Prison, to which they had been committed by the king. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate-house. The occasion is somewhat singularly expressed in the decision of the court, which was "that their voluntary retirement to the close stool" in the Gate-house "made them to be prisoners." The resolution, however, in question is this: "that the prison of the King's Bench is not any local prison confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary and depart thence, he shall be said to break prison."

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge, and I am unwilling to put any extreme case hypothetically; but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison, and yet, as obviously, none would be confined to it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial.²

LORD DENMAN, C. J. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned brothers would produce in support of their opinion might alter

¹ 1 Stat. 13 Ed. I. c. 48.

² The concurring opinions of Williams and Patteson, JJ., are omitted. — Ed.

mine. We have freely discussed the matter both orally and in written communications; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of the one line and into the other.

There is some difficulty, perhaps, in defining imprisonment in the abstract without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's *Nisi Prius*, p. 22, it is said: "Every restraint of a man's liberty under the custody of another, either in a gaol, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery, and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person: a locking up would constitute an imprisonment, without touching. From the language of Thorpe, C. J., which Mr. Selwyn cites from the Book of Assizes, it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment.

I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape.

It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned, because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading

through water, or by taking a route so circuitous that my necessary affairs should suffer by delay?

It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point. He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him. Yet he did not prevent his escaping in another direction.

It is said that if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous: it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

*Rule absolute.*¹

ELIZABETH A. PAYSON *v.* PERRY R. MACOMBER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1861.

[*Reported in 3 Allen, 69.*]

CHAPMAN, J. The third² count is for abduction and false imprisonment. It would have been difficult to sustain this count if it had been demurred to. Its allegations are, in substance, that the defendant, by false and fraudulent representations, procured the plaintiff secretly to remove, so that she could not be procured to testify in a prosecution against Pulsifer for criminal connection with her, and threatened her with exposure and a criminal prosecution if she should return; and by threats detained her for a great length of time illegally and against her will, and abducted her from her home against her consent.

¹ *Wright v. Wilson*, 1 *Ld. Raym.* 739; *Crossett v. Campbell* (*La.* 1908), 48 *So. R.* 141; *Balmain Ferry Co. v. Robertson*, 4 *Aust. C. L. R.* 379; *Queen v. Macquarie*, 13 *N. S. W. Sup. Ct. R. (Law)* 264 (*semble*), *Accord.*

Sea Hawk v. Ridgway, 33 *Ill.* 473. — *Ed.*

To order one to leave a boat which was moored to a wharf and, upon his refusal, to set the boat adrift is an imprisonment. *Queen v. Macquarie*, 13 *N. S. W. Sup. Ct. R. (Law)*, 264.

² Only so much of the case as relates to this count is given. — *Ed.*

The evidence tended to show that, by representations and threats of prosecution, and by paying her expenses, the defendant induced her to go to Salem and remain there for a while; and that she became satisfied he was deceiving her, and then returned and testified in the cause, which was a suit for divorce in favor of Mrs. Pulsifer against her husband. But it did not tend to show that the defendant used force or threats of force, and without this the plaintiff has no cause of action. It is at most a case where she yielded voluntarily to the defendant's misrepresentations and threats of a criminal prosecution against her, and absented herself from court and from her home for a time.

*Exceptions overruled.*¹

¹ See *State v. Lunsford*, 81 N. C. 528, for an instance of a practical joke not amounting to an imprisonment.

One is not responsible for the imprisonment of another by an officer unless he directs the officer to act. The mere signing of a charge sheet is not such a direction. *Sewell v. Nat. Co.* [1907], 1 K. B. 557. See also *Grinham v. Willey*, 4 H. & N. 499 per Pollock, C. B.; *Morgan v. Hughes*, 2 T. R. 114 per Ashurst, J.; *Farnam v. Feeley*, 56 N. Y. 451 per Andrews, J.

WRIT OF HABEAS CORPUS. For a discussion of the right of one wrongfully imprisoned to regain his liberty by the writ of *Habeas Corpus* see 2 Kent, Comm. star pages 26-32. — Ed.

SECTION IV.

Trespass upon Real Property.

SMITH v. STONE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1647.

[Reported in *Style*, 65.]

SMITH brought an action of trespass against Stone, *pedibus ambulando*. The defendant pleads this special plea in justification, viz., that he was carried upon the land of the plaintiff by force and violence of others, and was not there voluntarily, which is the same trespass for which the plaintiff brings his action. The plaintiff demurs to this plea. In this case, ROLL, J., said, that it is the trespass of the party that carried the defendant upon the land, and not the trespass of the defendant: as he that drives my cattle into another man's land is the trespasser against him, and not I, who am owner of the cattle.

PICKERING v. RUDD.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., JUNE 20, 1815.

[Reported in 1 *Starkie*, 56.]

DECLARATION for breaking and entering the plaintiff's close; for setting up, putting up, hanging, and placing a certain show-board in and upon and over the land of the plaintiff, and for breaking, lopping, and damaging a tree there growing. Plea, the General Issue; and as to the tree, the defendant pleaded that it was unlawfully spreading over a certain messuage of the defendant's adjoining to the *locus in quo*, and that because it was an incumbrance to his premises, therefore, &c., doing no unnecessary damage. Replication that the defendant of his own wrong, &c., and with greater force and violence than was necessary, and with greater damage to the said tree than was necessary, &c., on which issue was joined.

It appeared, that the house of the defendant adjoined to the garden of the plaintiff, which was behind his house in Bernard Street, and that a Virginian creeper which grew in the plaintiff's garden, spread itself over the side of the defendant's house, and was very ornamental to the prospect from the plaintiff's house. The defendant, a hair-cutter, wishing to hang up a show-board on that side of his house, which was

overspread by the Virginian creeper, managed by means of ropes and a scaffolding suspended over the garden, without touching the surface of the plaintiff's premises, to cut away such a portion of the creeper as was sufficient to admit the show-board, and affixed the board to his own house, projecting from three to four inches from the surface of the wall.

It was contended for the plaintiff that the putting up of the board, which projected three or four inches from the defendants' wall, over the garden of the plaintiff, was of itself a trespass, and this had not been justified.

LORD ELLENBOROUGH. You must prove that the projection is a trespass; it may be a very nice question. I recollect a case, where I held that firing a gun loaded with shot into a field was a breaking of the close.¹ The learned judge on the circuit with me doubted upon the point, but many with whom I afterwards conversed on the subject thought I was right; and the judge himself, who at first differed from me, was afterwards of the same opinion; but I never yet heard, that firing *in vacuo* could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might be maintained; but it may be questionable, whether an action on the case would not be the proper form.² Would trespass lie for passing through the air in a balloon over the land of another?³

The *Attorney-General* and *Richardson* contended that the dropping of rain from the projecting board upon the garden of the plaintiff was an inconvenience which entitled him to an action; and that if the projection was not a trespass, it would be no trespass to cover the whole extent of the garden.

LORD ELLENBOROUGH. Undoubtedly an action would be maintainable in that case for obstructing the light; but it is another question whether an action of trespass lies for interfering with the column of air incumbent on the land.⁴

It afterwards turned out that the board did not extend beyond the foundation wall of the defendant's house, which put an end to all question upon that point.

LORD ELLENBOROUGH, in summing up to the jury, told them that it was admitted upon the record that some damage had been done by the

¹ *Prewitt v. Clayton*, 5 Mon. 4; *Whittaker v. Stangvick*, 100 Minn. 386 *Accord.* — ED.

² See *Clifton v. Bury*, 4 T. L. R. 8, 9; *Whittaker v. Stangvick*, 100 Minn. 386.

³ "That case raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon: he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it." *Per Blackburn, J.*, in *Kenyon v. Hart*, 6 B. & S. 252. — ED.

⁴ In *Wells v. Oddy*, 1 M. & W. 457, *Pickering v. Rudd* being cited as a decision against the plaintiff, *Parke, B.*, said: "No; that point was not decided. It was thought by Lord Ellenborough to be a very nice question whether trespass was maintainable." Compare *Wandsworth Works v. United Co.*, 13 Q. B. Div. 915, 919, 927; *Clifton v. Bury*, 4 T. L. R. 8, 9. See in support of such an action *United States v. Appleton*, 1 Sumn. 492; *Smith v. Smith*, 110 Mass. 302. In *Butler v. Frontier Co.*, 186 N. Y. 486, ejectment was allowed against a defendant who had strung a telephone wire over the plaintiff's land. — ED.

continuance of the tree, and that the question was, whether in removing the mischief the defendants had done any damage to the tree which might have been avoided. *Verdict for the defendants.*¹

ELLIS v. THE LOFTUS IRON COMPANY.

IN THE COMMON PLEAS, NOVEMBER 19, 1874.

[Reported in Law Reports, 10 Common Pleas, 10.]

APPEAL from the county court judge of Glamorganshire.

The case as stated on appeal was as follows:—

The action was brought to recover £50, for injuries to the plaintiff's mare caused by the defendants' negligence.

The plaintiff was the occupier of a farm in the parish of Llansarran, and by arrangements between the plaintiff's landlord, the plaintiff, and the defendants, a portion of a field of the plaintiff's farm was let to the defendants for the execution of certain works, and a plot was fenced in by the defendants by means of a wire fencing.

The plaintiff's land, which adjoined the part taken by defendants, was used by him as grazing land for horses and cattle to the knowledge of the defendants.

The defendants were possessed of an entire horse, used by them as a draught cart-horse, and on Sunday, the 18th of August, this horse was turned into the plot occupied by the defendants. The plaintiff had full knowledge of the condition of the fence surrounding it. The mare grazed in the remaining portion of the field adjoining that portion occupied by the defendants. The defendants' horse had been turned out on former occasions on the same plot, and had always been watched. The horse of the defendants and one of the plaintiff's mares got close together on either side of the wire fence, and the horse by biting and kicking the mare through the fence committed the injury complained of, the damage being taken at £15.

It was proved that the defendants' horse did not trespass on the land of the plaintiff by crossing the fence. Both animals were close to the fence when the injury happened. There was no evidence that the horse was of a vicious temper, or had bitten or kicked any animal before; on the contrary, it was stated that the horse was as quiet a temper as you would ever wish a horse.

¹ If the branches or roots of a tree of one man encroach upon the land of another, the latter may cut away the branches or roots up to the boundary line. *Norris v. Baker*, 1 Rolle R. 394, 3 Bulst. 198, s. c. ; *Crowhurst v. Burial Board*, 4 Ex. Div. 5, 10; *Grandona v. Lovdal*, 70 Cal. 161; *Hickey v. Mich. Co.*, 96 Mich. 498; *Newberry v. Bunda*, 137 Mich. 69 (*semble*); *Countryman v. Lighthill*, 24 Hun, 405. And he may do so, without notice to the owner of the tree, if he does not enter upon the latter's land. *Lemmon v. Webb* [1895], A. C. 1. And if overhanging branches cause damage to his neighbor, the owner of the tree is responsible for the tort. *Smith v. Giddy* [1904], 2 K. B. 448.

The plaintiff had warned the defendants to keep the horse away from his mares.

The judge, being of the opinion there was no trespass, and that the damage was too remote, held there was no case for the jury.

The question for the court was, whether the plaintiff was entitled to recover from the defendants for the injuries caused as aforesaid, the horse being a stallion.

LORD COLERIDGE, C. J. The judgment of the county court judge must, I think, be reversed, on the ground that there was evidence of a trespass, and the damages were not too remote. I cannot say I entertain any doubt in the matter. It is clear that, in determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it. It has, moreover, been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small. In this case it is found that there was an iron fence on the plaintiff's land, and that the horse of the defendants did damage to that of the plaintiff through the fence. It seems to me sufficiently clear that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law. The only remaining question is, whether the damages were too remote? I cannot see that they were; they were the natural and direct consequence of the trespass committed. These considerations would dispose of the case, but apart from any technicalities of law, it seems to me that the merits are in the plaintiff's favor. It appears that a piece of land was railed off for the defendants' convenience, and the plaintiff being in the habit of keeping mares on the adjoining land previous to this accident, the defendants' stallion had always been watched. Therefore, without saying that there was any gross negligence or carelessness on defendants' part, I think there was some default on their part, without which the accident would not have happened. It is not necessary for me to discuss the authorities that have been cited at length. I will only say that *Lee v. Riley*¹ is a very strong authority for our present decision. For these reasons I am of opinion that our judgment should be for the plaintiff.

KEATING, J. I am of the same opinion. The county court judge appears to have held that the facts as stated did not amount to evidence of an actionable wrong on the part of the defendants. There seems to me, however, to be abundant evidence that the defendants' horse committed a trespass for which the defendants are liable. The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet

¹ 18 C. B. (N. S.) 721.

protruded through the fence over the plaintiff's land, and that would, in my opinion, amount in law to a trespass. If evidence of negligence was necessary to constitute a trespass in this case, in my opinion there is abundant evidence of negligence on the defendants' part, and none on that of the plaintiff. The defendants erected the fence, and turned the horse into the field for their own convenience; they had ample warning with respect to the danger, and in consequence of such warning they had the horse watched on previous occasions, but failed to do so on the occasion when the damage was caused.

BRETT, J. I must confess I did entertain some doubt on this matter. The questions are whether there was any evidence of a trespass on the plaintiff's land, for which the defendants would be liable, and if there was, then, whether the damage is too remote. I had no doubt that if there was evidence of negligence, and as a result of such negligence an animal of the defendants passed wholly or in part on to the plaintiff's land, such a circumstance would constitute a trespass; but what I did doubt for some time was, whether, where there was no negligence at all on the part of the defendants, the same consequence would follow. Having looked into the authorities, it appears to me that the result of them is that in the case of animals trespassing on land the mere act of the animal belonging to a man, which he could not foresee, or which he took all reasonable means of preventing, may be a trespass, inasmuch as the same act, if done by himself, would have been a trespass. Blackstone, 16th ed., vol. iii. c. 12, p. 211; Chitty on Pleading, 7th ed., vol. i. p. 93, and Comyns' Digest, title Trespass C, are all authorities to this effect. If, however, it were necessary that there should be evidence of negligence, I cannot say that I should go the length that my Brother Keating did in saying that there was abundant evidence of negligence, though I think there was some evidence. That would be sufficient to support our judgment in any view of the law, but I put my judgment on the ground that by law there was a trespass in this case without evidence of negligence. That being so, the question remains whether the damages were too remote. The case of *Lee v. Riley*¹ is a distinct authority to the contrary, and the American case of *Vandenburgh v. Truax*,² quoted in the notes to *Vicars v. Wilcocks*,³ is to the same effect.

DENMAN, J. I rather agree with my Brother Brett as to the amount of the evidence of negligence in this case. I am by no means clear that there was such evidence of negligence, as, if it was necessary to prove negligence, would have properly entitled the plaintiff to a verdict. The county court judge appears to have nonsuited the plaintiff on the ground that there was no trespass, and the damages were too remote. Now, during the early part of the argument I thought it a very strong thing to say that whenever any part of an animal passed over or through a fence, inasmuch as the same act, if done by a man,

¹ 18 C. B. (N. S.) 722.

² 4 Denio, 464.

³ 2 Sm. L. C. p. 499 (6th ed.).

might technically be a trespass, therefore there was a trespass on the part of the owner of the animal. But after hearing the authorities cited, and especially the case of *Lee v. Riley*,¹ and the passages from Comyns' Digest and Chitty on Pleading, it appears to me that they undoubtedly bear out that view.

It seems hard, when two parties have adjoining lands with a fence between them, and a quarrel arises between the animals on either side of the fence, one party should be liable for the consequences, though not in reality guilty of default or neglect any more than the other party, by reason of the application to the mere act of an animal of the technical rule, *Cujus est solum ejus est usque ad cælum*. I must say, however, that I cannot see, upon the authorities, any escape from the conclusion that it must be so. The only remaining point is whether the damages were too remote. As to that, I agree with the rest of the court that the case of *Lee v. Riley*¹ is conclusive.²

*Judgment for the plaintiff.*³

DOUGHERTY v. STEPP.

SUPREME COURT, NORTH CAROLINA, DECEMBER, 1835.

[Reported in 1 *Devereux & Battle*, 371.]

THIS was an action of trespass *quare clausum fregit*, tried at Buncombe, on the last circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This his Honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

Mendenhall, for the plaintiff, contended that every unwarrantable entry on another man's soil is considered a trespass by breaking his close; for that in contemplation of law every man's land is separated and set apart from his neighbor's, by either a material or invisible and ideal boundary; and that every entry carries with it some damage, if no other, the treading down and bruising the herbage and shrubbery. That whenever a man has a right to enclose his estate by a real substantial fence, the law regards it as already enclosed against the unau-

¹ 18 C. B. (N. S.) 722.

² The cases of *Millen v. Fandrye*, Poph. 161, and *Glenham v. Hanby*, 1 Ld. Raym. 739, and the *dictum* attributed to Holt, C. J., in *Mason v. Keeling*, 1 Ld. Raym. 608, seem to show that the doubt indicated by Brett and Denman, JJ., existed also at the time when those cases were decided, though from the reports of the two first-mentioned cases it is difficult to gather what exactly was the point involved.

³ *Hannabalsen v. Sessions*, 116 Iowa, 477 (putting one's arm over the fence into the air above the plaintiff's land is a trespass).

thorized intrusion of his neighbor. In illustration and support of these positions he cited 3 Bl. Comm. 209; 6 Bac. Abr. 581, title Trespass; M'Kinzie's Executors v. Hulet;¹ Hammond's N. P. 151, 152; Dyer, 225 b, pl. 40.

No counsel appeared for the defendant.

RUFFIN, C. J. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle that every unauthorized, and therefore unlawful, entry into the close of another is a trespass. From every such entry against the will of the possessor the law infers some damage; if nothing more, the treading down the grass or the herbage, or, as here, the shrubbery. Had the *locus in quo* been under cultivation or enclosed, there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held that, if there be no adverse possession, the title makes the land the owner's close. Making the survey and marking trees, or making it without marking, differ only in the degree and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute nor rule of reason that will make a wilful entry upon the land of another, upon an unfounded claim of right, innocent, which one who set up no title to the land could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

*Per Curiam. Judgment reversed.*²

¹ N. C. Term Rep. 181.

² Dumont v. Miller, 4 Aust. Jur. R. 152; United States v. Taylor, 35 Fed. Rep. 484; Attwood v. Fricot, 17 Cal. 37; Pfeiffer v. Grossman, 15 Ill. 53; Mundell v. Hugh, 2 Gill & J. 198; Baltimore Co. v. Boyd, 67 Md. 32; Brown v. Manter, 22 N. H. 472; Guille v. Swan, 19 Johns. 381; Dixon v. Clow, 24 Wend. 188; Pierce v. Hosmer, 66 Barb. 345; Newsom v. Anderson, 2 Ired. 42; Norvell v. Thompson, 2 Hill (S. C.), 470; Carter v. Wallace, 2 Tex. 206 Accord.

Innis v. Crummins, 1 Mart. N. S. 560; Keller v. Mosser, Tapp. (Ohio) 43 Contra. — Ed.

SECTION V.

Trespass upon Personal Property.

MARLOW v. WEEKES.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1744.

[Reported in Barnes, Notes, 452.]

TRESPASS for assaulting, beating, and wounding plaintiff's mare.

After a verdict for plaintiff, defendant moved in arrest of judgment, objecting, that an action of assault and battery is not applicable to a dead thing, or a brute beast, but to one of the human species only. The objection was now overruled, and the order *nisi causa* discharged. Assault upon a ship (a dead thing) bad; but for an injury to a beast, a writ in trespass *vi et armis* appears in the Register;¹ the beating and wounding are found by the jury. *Draper* for defendant; *Wynne* for plaintiff.²

¹ There seems to be no such writ in the Register. Trespass for the asportation or the destruction of a chattel are the only writs for trespass affecting personal property. Other injuries to chattels were doubtless deemed of too trivial a nature to warrant a proceeding in the king's court, and were redressed in the inferior courts. See also Y. B. 12 Hen. IV. fol. 8, pl. 15. — Ed.

² "Action upon the case, for that the plaintiff was possessed of a horse and cart, and the defendant so violently beat the horse that the plaintiff was deprived of the use of his cart and horse for several days. The defendant pleaded not guilty. And the Chief Justice allowed him to give in evidence a justification for beating the horse, viz., that the plaintiff put his cart before the defendant's door, and prevented a cart which the defendant had hired from coming to take his goods, and therefore he whipped the horse to remove the cart. And the Chief Justice said, this differed from trespass *vi et armis* for assaulting a man, where the assault is a cause of action; but here the assault on the horse is no cause of action, unless accompanied with a special damage. And therefore he left it to the jury, on the question whether defendant did any more than was necessary to remove the horse and cart from his door, or beat the horse immoderately. And they found for the defendant. He said, if a hackney coach stands before a tradesman's door, and hinders customers, he may lawfully take hold of the horses and lead them away, and is not bound to take his remedy for damages. *Strange pro querente*." — *Slater v. Swan*, 2 Stra. 872. See also *Marentille v. Oliver*, *supra*, p. 27, and compare *Dand v. Sexton*, 3 T. R. 37; *Bull v. Colton*, 22 Barb. 94.

In *Paul v. Slason*, 22 Vt. 231 (see *Fullam v. Stearns*, 30 Vt. 456-57), the defendant, a sheriff, attached plaintiff's hay, and in removing it used the plaintiff's pitchfork. The plaintiff brought an action of trespass for taking the pitchfork, but failed. There would seem to have been no asportation, the fork being all the time on the plaintiff's premises. Nor was the pitchfork injured. The court proceeded upon the maxim, *De minimis non curat lex*; but on historical grounds their decision seems to be correct. — Ed.

DAVID MILLER v. JOHN BAKER 2D.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1840.

[Reported in 1 Metcalf, 27.]

TRESPASS against the sheriff of Norfolk for taking, by one of his deputies, nursery trees, shrubs, and plants, and converting them to his own use.

A verdict for the plaintiff was taken, and is to be sustained, or set aside, as the court shall order.

S. D. Parker, for the defendant.

D. A. Simmons, for the plaintiff.¹

DEWEY, J. That trespass *de bonis asportatis* is a proper form of action where the owner of personal chattels seeks to recover against the sheriff damages for the illegal act of his deputy, in taking such chattels under color of process of law and by virtue of his office, is too well settled to admit of a question.

Nor is there any doubt that the acts done by the servant of the defendant would constitute a trespass, as to the personal chattels of the plaintiff. A forcible taking of goods is not necessary to enable the owner to maintain trespass. On a similar question in *Gibbs v. Chase*,² Sewall, J., says, "No actual force is necessary to be proved. He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril to answer me the value in trespass or trover." It is sufficient to maintain trespass, if the party exercises an authority over the goods against the will and to the exclusion of the owner by an unlawful intermeddling, though there be no manual taking or removal.³

In the present case there was not only an attachment of the property, but the placing of a keeper over it with directions to permit no one to remove the same, and an entry and exclusive possession by the keeper. It seems, therefore, that as to so much of the property in controversy as is conceded to be personal chattels, the case is clearly with the plaintiff.⁴

¹ The statement of facts, the arguments of counsel, and a portion of the opinion are omitted. — Ed.

² 10 Mass. 128.

³ *Wintringham v. Lafoy*, 7 Cow. 735 ; *Philips v. Hall*, 8 Wend. 610.

⁴ *Cramer v. Mott*, L. R. 5 Q. B. 357 (but see *Hartley v. Moxham*, 3 Q. B. 701); *Gibbs v. Chase*, 10 Mass. 125 ; *Morse v. Hurd*, 17 N. H. 246 ; *Wintringham v. Lafoy*, 7 Cow. 735 ; *Phillips v. Hall*, 8 Wend. 610 ; *Neff v. Thompson*, 8 Barb. 213 *Accord*. Compare *Holmes v. Doane*, 3 Gray, 328.

To constitute an attachment or levy upon personal chattels, the acts of the officer must be such as would make him a trespasser but for the protection of his writ. In accordance with this test there was thought to be a valid attachment in the following cases : *Very v. Watkins*, 23 How. 469 ; *Richardson v. Rardin*, 88 Ill. 124 ; *McBurnie v. Overstreet*, 8 B. Mon. 303 ; *Nichols v. Patten*, 18 Me. 231 ; *Denny v. Warren*, 16

Mass. 420; *Gordon v. Jenney*, 16 Mass. 465; *Naylor v. Dennie*, 8 Pick. 198; *Hemenway v. Wheeler*, 14 Pick. 408; *Shephard v. Butterfield*, 4 Cush. 425; *Patch v. Weasels*, 46 Mich. 249; *Huntington v. Blaisdell*, 2 N. H. 317; *Cooper v. Newman*, 45 N. H. 339; *Green v. Barker*, 23 Wend. 490; *Barker v. Binninger*, 14 N. Y. 270; *Roth v. Wells*, 29 N. Y. 471; *Pugh v. Calloway*, 10 Ohio St. 488; *Moss v. Moore*, 3 Hill, S. Ca. 276; *Newton v. Adams*, 4 Vt. 437; *Lyon v. Rood*, 12 Vt. 233; *Slate v. Barker*, 26 Vt. 647; *Bullitt v. Winston*, 1 Munf. 269.

In the following cases, on the other hand, by the same test, there was not a valid attachment: *Adler v. Roth*, 5 Fed. Rep. 895; *Cobb v. Cage*, 7 Ala. 619; *Abrams v. Johnson*, 65 Ala. 465; *Taffts v. Manlove*, 14 Cal. 47; *Crisman v. Dorsey*, 12 Colo. 567; *Hollister v. Goodale*, 8 Conn. 332; *Powell v. McKechnie*, 3 Dak. 319; *Levy v. Shockey*, 29 Ga. 710; *Minor v. Herriford*, 25 Ill. 344; *Havely v. Lowry*, 30 Ill. 446; *Chittenden v. Rogers*, 42 Ill. 100; *Culver v. Rumsey*, 6 Ill. Ap. 598; *Crawford v. Newell*, 23 Iowa, 453; *Rix v. Silknitter*, 57 Iowa, 262; *Bickler v. Kendall*, 66 Iowa, 703; *Hibbard v. Zenor*, 75 Iowa, 471; *Banks v. Evans*, 18 Miss. 35; *Gates v. Flint*, 39 Miss. 365; *Bryant v. Osgood*, 62 N. H. 182; *Haggerty v. Wilber*, 16 Johns. 287; *Beckman v. Lansing*, 3 Wend. 446; *Westervelt v. Pinckney*, 14 Wend. 123; *Camp v. Chamberlain*, 5 Den. 198; *Root v. R. R. Co.*, 45 Ohio St. 222; *State v. Cornelius*, 5 Oreg. 46; *Duncan's App.*, 37 Pa. 500; *Carey v. Bright*, 58 Pa. 70, 84; *Connell v. Scott*, 5 Baxt. (Tenn.) 595; *Brown v. Lane*, 19 Tex. 203; *Blake v. Hatch*, 25 Vt. 555.

In *Lyon v. Rood*, *supra*, Redfield, J., said: "From the fact that in England they have no law for attaching property upon mesne process, and, that judgments in that country create a lien upon property, without the necessity of a formal levy of the execution, questions of this character do not arise there. The cases in the English courts, most analogous to the present case, are those which concern the arrest of the body. . . . To constitute an arrest of the person, the officer must be armed with legal process, he must have the custody and control of the defendant's body, at least potentially, and he must claim that control by virtue of the process, and, unless it is submitted to, must put it in actual exercise. The same rule, with such modifications as the different subject-matters may require, will apply to the attachment of personal property. It is not perhaps necessary, in any case, that the officer should actually touch the property, but, to constitute a legal attachment, he must have the custody or control of the property, either by himself or his servants, in such a way as either to exclude all others from taking the custody of the property, or, at least, to give timely and unequivocal notice of his own custody. Hence, in *Lane et al. v. Jackson*, 5 Mass. R. 157, *Parsons, C. J.*, says, 'That to constitute an attachment of goods, the officer must have the actual possession and custody.' And in *Train v. Wellington*, 12 Mass. R. 495, the same rule is adhered to, with this qualification, 'not that every article must be taken hold of, but that the officer must be in view of the whole, with the power of taking them into his actual custody.' In the case of *Denny v. Warren*, 16 Mass. R. 420, it was held that taking possession of the key of a store and declaring an intention to attach, was a sufficient attachment. The same rule is adhered to in the case of *Gordon v. Jenney*, *Ib.* 465. In *Naylor v. Dennie*, 8 Pick. 198, it was decided that goods, in the hold of a ship, might be attached by the officer going on board the ship and leaving a keeper to take care of them. And again, in *Merrill v. Sawyer*, 8 Pick. 397, it was decided that hay in a barn was sufficiently attached, by putting a notification of the attachment on the barn door. There is the case of *Hollister v. Goodale*, 8 Conn. 332, where the court decided that if one officer have the key of a carriage house and go and open it and declare that he attaches a carriage standing therein, and at the same time another officer rushes in and first gets the manual custody of the carriage, he will hold it, as having first legally attached it, which seems not to accord, in principle, with the other cases.

"In regard to the last case referred to, I can only say, that, if it is correctly reported, it must have been wrongly decided, and Mr. Justice Peters, who tried the case at the circuit, and ruled the law the other way, must have been a man of very singular modesty and urbanity to have said that 'he was inclined to concur (with his brethren), though not quite satisfied that the charge was wrong.'" — ED.

DANIEL COLE v. JACOB FISHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY TERM, 1814.

[Reported in 11 *Massachusetts Reports*, 137.]

TRESPASS *vi et armis*, for firing a gun, by which the plaintiff's horse was frightened, and ran away with his chaise, and broke and spoiled it, &c.

The cause came before the court upon an agreed statement of facts to the following effect, viz.: The defendant, after washing out two guns, went to the door of his shop, and, standing there, discharged one of the guns for the purpose of drying it, the said shop-door being about one rod distant from the highway. At the time of said discharge, the plaintiff's horse, harnessed in his chaise, was fastened by his bridle to the fence on the opposite side of the highway. The horse, being frightened by the discharge of the gun, broke the bridle, and ran away with the chaise, which was thereby broken and injured. After the horse was unharnessed and put into a pasture in the defendant's neighborhood, he discharged another gun, for the like purpose of drying it.

If, upon these facts, in the opinion of the court, the plaintiff could maintain this action, the defendant was to be defaulted, and the plaintiff's damages to be assessed by a jury, unless agreed by the parties; if the plaintiff could not, in the opinion of the court, maintain his action on the facts agreed, he was to become nonsuit, and the defendant recover his costs.

There was no argument, and the opinion of the court was delivered by

SEWALL, C. J.¹ Upon this state of facts, our opinion is, that the plaintiff has sustained an injury by the act of the defendant. The plaintiff has a right of action. a just demand for damages; but whether in the form of trespass, or of trespass on the case, is a question of some difficulty in the circumstances of this case.

The well-known distinction of immediate injury and consequential injury is the rule upon which our doubts have arisen; in all other respects, the action is clearly maintained for the plaintiff upon the facts agreed.

It is immaterial, as respects the right of action, or the form, whether the act of the defendant was by his intention and purpose injurious to the plaintiff, or the mischief which ensued was accidental, and beside his intention, or contrary to it. The decision in the case of *Underwood v. Hewson*² has never been questioned. There the defendant was uncocking his gun, when it went off and accidentally wounded a

¹ A portion of the opinion is omitted. — ED.

² *Strange*, 596.

bystander. The defendant was charged, and holden liable in trespass. Other cases, before and since, might be cited, in which the same doctrine, which governed in that decision, has been recognized as the law. There is a very full and accurate collection of the decisions on this subject, both as to the right and the form of action, in Chitty on Pleading, to which I refer.¹

In the case at bar, it does not appear, from the facts stated, how near the place where the horse was fastened was to the door of the shop, the place where the gun was fired. If the horse and chaise were in plain sight, and near enough to be supposed to excite any attention or caution on the part of the defendant, or if it was in evidence that he had noticed their being there, exposed to the consequences of his firing the gun, and the distance was such as that, by common experience, there might be a reasonable apprehension of frightening the horse by the discharge of the gun, I should think the defendant, although no purpose of mischief was proved, and even if it was not a case of very gross negligence, liable in an action of trespass. On the other hand, if the plaintiff's horse and chaise were out of his sight, and had not been noticed by the defendant, and the distance was such as that no reasonable apprehension of frightening the horse could arise, supposing the horse and chaise to have been observed by the defendant, the injury is hardly to be considered as sufficiently immediate upon the act of the defendant to render him liable in this form of action; although undoubtedly liable in an action upon the case, to the extent of the damage actually sustained by the plaintiff.²

BRUCH v. CARTER.

COURT OF ERRORS AND APPEALS, NEW JERSEY, MARCH TERM, 1867

[Reported in 3 Vroom, 554.]

IN trespass. Error to Warren circuit.

S. B. Ransom, for plaintiff in error. *J. G. Shipman*, for defendant in error.

The opinion of the court was delivered by

WOODHULL, J.³ The writ of error in this case brings up for review

¹ Chitty, 123-128; Sir T. Raym. 422, 467; Hob. 134; Str. 596.

² *James v. Caldwell*, 7 Verg. 38; *Waterman v. Hall*, 17 Vt. 128 *Accord*.

In *Loutz v. Hafner*, 1 Dev. 185, the defendant was held liable in trespass for intentionally causing the plaintiff's horse to run away with him, to his damage, by beating a drum.

Commonwealth v. Wing, 9 Pick. 1, decided that if one discharged a gun with knowledge that the report would throw an individual into convulsions, and such effect followed, his act was an indictable offence. Compare *Rogers v. Elliott*, 146 Mass. 249. — ED.

³ The opinion has been slightly abridged. — ED.

a judgment of the Warren county Circuit Court against the plaintiff in error and two co-defendants, Jacob Cowell and Robert Fair, after verdict in an action of trespass.

The defendants, Cowell and Fair, having refused to join in the writ, the plaintiff in error, after rule and severance, was allowed to prosecute it alone.

The declaration contains four counts. The first sets forth that the defendants, "with force and arms, seized and wrested, from a certain hitching post at which there stood tied a certain horse of the said plaintiff of great value, to wit, of the value of three hundred dollars, and took the said horse a great distance, to wit, the distance of ten yards, and tied him to another post, and threw the said horse down and killed him."

The second count alleges that the defendants, "with force and arms, seized and broke loose from a certain post of the said plaintiff, where he stood tied, a certain other horse of the said plaintiff of great value, &c., and removed the said horse a great distance, to wit, a distance of ten yards, and fastened the said other horse to a certain other post, by means whereof the said horse of the said plaintiff became entangled in his halter, was thrown with great violence upon the ground, and was instantly killed."

The third count states that the defendants, "with force and arms, broke loose, &c. (as in the second), and threw down, and caused to be thrown down upon the ground, the last-named horse of the said plaintiff, and with a certain horse, then in the possession of the said defendant, George Bruch, did stamp, beat, strike, injure, and kill the said last-named horse of the said plaintiff."

The fourth count thereby charges that the defendants, "with force and arms, and with a certain horse, which the said defendants then and there had, so greatly beat, hurt, and wounded a certain other horse of him, the said plaintiff, of great value, &c., that by reason thereof the same horse afterwards died."

To this declaration the plaintiff in error, by his attorney, pleaded the general issue, and the other defendants below, by their attorney, pleaded the same plea.

The first error assigned is, "that the declaration, and the matters therein contained, are not sufficient in law for the said John Carter to maintain his action against the said George Bruch."

In the absence of anything to indicate wherein the declaration is supposed to fall short of disclosing a legal cause of action, it is sufficient to say that, taking the facts to be true as stated in either one of the four counts, they show a trespass committed by the defendants to the injury of the plaintiff below, and for which he may recover damages in this action.

The objection to the declaration is, therefore, not sustained.

It appears by the bill of exceptions that, after the plaintiff below had rested his cause, the defendants, by their counsel, moved that the

plaintiff be nonsuited, on the ground that he had not established his right to recover in the action. The motion was overruled, and this is the second matter assigned for error.

If there was error in refusing to order a nonsuit, it must be because the plaintiff had failed to offer any evidence from which the jury might legally infer that the defendants, or either of them, had committed any act of trespass alleged in the declaration.

No extended examination of the testimony is required to show that the motion to nonsuit was properly refused. The fact that Jacob Cowell, one of the defendants, untied the plaintiff's horse, and removed him from the hitching-post, to which his owner had fastened him, is so clearly established by the testimony of John Carter, the plaintiff below, and of Jacob Cowell himself, that it does not appear to have been at all controverted in the cause. It is equally clear that the post in question stood in the highway, and that the plaintiff's right to use it, if not exclusive, was, at least, as good as that of either of the defendants. Here, then, we find, without looking further, acts done by one of the defendants, which must be held to amount to at least a technical trespass, for which the plaintiff below would be entitled, under the declaration in the cause, to recover nominal damages against this defendant, if nothing more.

The plaintiff had, therefore, established his right to recover in the action, and there was no error in overruling the motion for a nonsuit.

SECTION VI.

Excusable Trespasses.

(a) ACCIDENT OR MISTAKE.

WEAVER v. WARD.

IN THE KING'S BENCH, EASTER TERM. 1616.

[Reported in Hobart, 134.]

WEAVER brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff: and that they were skirmishing with their muskets charged with powder for their exercise *in re militari* against another captain and his band; and as they were so skirmishing, the defendant, *casualiter et per infortunium et contra voluntatem suam*, in discharging his piece, did hurt and wound the plaintiff; which is the same, &c., *absque hoc*, that he was guilty *aliter sive alio modo*. And, upon demurrer by the plaintiff, judgment was given for him; for, though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done *animo felonico*; yet, in trespass, which tends only to give damages according to hurt or loss, it is not so; and, therefore, if a lunatic hurt a man, he shall be answerable in trespass,¹ and, therefore, no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here

¹ Gates v. Miles, 3 Conn. 64, 70; McIntyre v. Sholty, 121 Ill. 660; Amick v. O'Hara, Blackf. 258, 259; Cross v. Kent, 32 Md. 581; Feld v. Borodófski, 87 Miss. 727; Bullock v. Babcock, *infra*, p. 64; Krom v. Schoonmaker, 3 Barb. 647 (imprisonment); Ward v. Conatser, 4 Baxt. (Tenn.) 64; Brennan v. Donaghey, 19 N. Zeal. Gaz. L. R. 289, affirming a.c. 2 New Zeal. Gaz. L. R. 410 *Accord*.

The rule is the same as to torts in general. Behrens v. McKenzie, 23 Iowa, 333, 343; Morain v. Devlin, 132 Mass. 87 (nuisance); Jewell v. Colby, 66 N. H. 399; Re Heller, 3 Paige, 199; Williams v. Hays, 143 N. Y. 442 (compare Williams v. Hays, 157 N. Y. 541); Williams v. Cameron, 26 Barb. 172; Lancaster Bank v. Moore, 78 Pa. 407, 412; Morse v. Crawford, 17 Vt. 499 (conversion).

In McIntyre v. Sholty, *supra*, Magruder, J., said, p. 664: "It is well settled that, though a lunatic is not punishable criminally, he is liable in a civil action for any tort he may commit. However justly this doctrine may have been originally subject to criticism on the grounds of reason and principle, it is now too firmly supported by the weight of authority to be disturbed. It is the outcome of the principle, that, in trespass, the intent is not conclusive. Mr. Sedgwick, in his work on Damages (margin, p. 456), says that, on principle, a lunatic should not be held liable for his tortious acts. Opposed to this view, however, is a majority of the decisions and text writers."

the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.¹

DICKENSON v. WATSON.

IN THE KING'S BENCH, HILARY TERM. 1682.

[Reported in *T. Jones*, 205.]

THE plaintiff brought error on a judgment in the court of the sheriffs of the city of York, in trespass for an assault, battery, and wounding of the plaintiff's eye, by discharging of a gun charged with powder and hail-shot, by which he lost the sight of his eye. The defendant pleaded *actio non*, because he is, and at the time of the trespass was, an officer appointed for collecting the duty of hearth-money; and for the better discharge of his office, and more sure custody and keeping of the money by him collected and to be collected, he provided himself with fire-arms, and having one of his pistols in his hands, and intending to discharge it *ne aliquod damnum eveniret*, he discharged it (*nemine in opposito visu existente*), and while he discharged it, the plaintiff *casualiter viam illam præterivit, et si aliquod malum ei inde accideret hoc fuit contra voluntatem*, of the defendant. *Quæ est eadem transgressio*. Upon this the plaintiff demurred, and judgment was given for him; whereupon error was brought, and judgment was affirmed, nothing being urged besides the sufficiency of the plea. But the court held it to be insufficient; for in trespass the defendant shall not be excused without unavoidable necessity, which is not shown here. Besides, the defendant did not traverse *absque hoc quod aliter seu alio modo*, as was done in the case of Weaver and Ward. And yet judgment there given for the plaintiff.

"So long as the primitive notion prevailed that the doer of harm was absolutely responsible therefor, the insanity of the doer could afford no defence, either to a criminal prosecution or a civil action. 7 Harv. L. Rev. 446. When this notion was so far modified that misadventure or accident on the part of the doer became a defence, it would have been entirely logical for the courts to treat the acts or the omissions of lunatics as involuntary, and consequently not tortious but accidental." Burdick, *Torts* (2d ed.), 60. See also 22 Harv. L. Rev. 99-100. — ED.

¹ Underwood v. Hewson, 1 Stra. 596; Welch v. Durand, 38 Conn. 182; Atchison v. Dullam, 16 Ill. Ap. Hodges v. Westbeyer, 6 Monr. (Ky). 337; Chataigne v. Bergeron, 10 La. An. 699; Sullivan v. Murphy, 2 Miles, 298; Castle v. Duryee, 2 Keyes, 169; Taylor v. Rainbow, 2 Hen. & Mun. 423 Accord.

See to the same effect Morgan v. Cox, 22 Mo. 373; Dygert v. Bradley, 8 Wend. 469; Jennings v. Fundeburg, 4 McC. 161; Tally v. Ayers, 3 Sneed, 677, in which case the injury was not to the plaintiff's person, but to his chattels. — ED.

JAMES v CAMPBELL.

AT NISI PRIUS, CORAM BOSANQUET, J., APRIL 25, 1832.

[Reported in 5 Carrington & Payne, 372.]

ASSAULT and battery. It appeared that, at a parish dinner, the plaintiff and defendant (who, it seemed, were not on good terms, in consequence of something which took place with respect to a leet jury), together with a Mr. Paxon and others, were present. Mr. Paxon and the defendant quarrelled, and had proceeded to blows, in the course of which the defendant struck the plaintiff, and gave him two black eyes, and otherwise injured him. Afterwards Mr. Paxon wrote, and the defendant was desired to put his name to, the following paper:

"Frank Paxon having struck me, I returned the blow, but must, as I have been since informed, have struck Mr. James instead of Mr. Paxon, for which I am sorry."

The defendant, upon this, said: "I won't have that in; I'm not sorry; I will hunt the vagabond in all quarters."

Bodkin, for the defendant, in his address to the jury, contended that, if the defendant did not intentionally strike the plaintiff, they ought to find their verdict for him.

MR. JUSTICE BOSANQUET (to the jury). If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages.

*Verdict for the plaintiff. Damages, £10.*¹

STANLEY v. POWELL.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 3, 1890.

[Reported in 1891, 1 Queen's Bench Division, 86.]

DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.²

In the statement of claim the plaintiff alleged that the defendant had *negligently and wrongfully and unskilfully* fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury:

¹ Ball v. Axten, 4 F. & F. 1619; Peterson v. Hafner, 59 Ind. 180; Anderson v. Arnold, 79 Ky. 370; Corning v. Corning, 6 N. Y. 97; Cogdell v. Yett, 1 Coldw. 230; Knott v. Wagner, 16 Lea, 481; Wright v. Clark, 50 Vt. 130 *Accord.* — Ed.

² Only the opinion of the court is given. — Ed.

1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were, that on Nov. 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation, at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and, striking the plaintiff, must have caused the injury complained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line, that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases — that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that, by no amend-

ment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year-book 21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame v. Bray*,¹ to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere *dictum* of Rede, who (see 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, "*Mes ou on tire a les buts et blesse un homme, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *prima facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was *Weaver v. Ward*, decided in 1607. There is no doubt that that case contains *dicta* which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: "Therefore, no man shall be excused of a trespass . . . except it may be judged utterly without his fault," showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as sol-

¹ 3 East, 593.

diers of the train-band, and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie, *unless* he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons v. Pepper*, decided in 1695, merely decided that a plea merely showing that an accident caused by a runaway horse was *inevitable*, was a bad plea in an action of trespass, because, if *inevitable*, that was a defence under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which show clearly the *ratio decidendi* of that case, are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found *not guilty*, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of *Wakeman v. Robinson*, and *Hall v. Fearnley*, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of *dictum* in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment explains *Wakeman v. Robinson* thus: "The act of the defendant" (*viz.*, driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "*was prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*. It was there agreed that an *involuntary* act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant.

The case of *Underwood v. Hewson*,¹ decided in 1724, was relied on for the plaintiff. The report is very short. "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass — *Strange pro defendente*." The marginal note in Nolan's edition of 1795, not necessarily *Strange's* own composition, is this: "Trespass lies for an accidental hurt;" and in that edition there is a

¹ 1 Str. 596.

reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver v. Ward*, I find he writes as follows: "So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam*; for no man shall be excused of a trespass, unless it be justified entirely without his default: *Weaver v. Ward*; and, therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded: *Underwood v. Hewson*." On referring back to *Weaver v. Ward*, I can find nothing in the report to show that the court held, that in order to constitute a defence in the case of a trespass it is necessary to show that the act was *inevitable*. If *inevitable*, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

*Day v. Edwards*¹ merely decides that where a man negligently drives a cart against the plaintiff's carriage, the injury being committed by the *immediate* act complained of, the remedy must be trespass, and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame v. Bray*.² That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curricule, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any *other* respect as to the manner of his driving. It was therefore objected for the defendant, that the injury *having happened from negligence* and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*; and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by Lawrence, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that

¹ 5 T. R. 648 (1794).

² 3 East, 593.

there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of *Holmes v. Mather*, and *Bramwell, B.*, in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: if the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, Trespass, I., p. 706, with a marginal reference to *Weaver v. Ward*. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand, "that the injury was unintentional"), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence, — there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned, — and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an

action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant. As to costs, they must follow, unless the defendant foregoes his right.

*Judgment for the defendant.*¹

BULLOCK v. BABCOCK.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1829.

[Reported in 3 *Wendell*, 391.]

THIS was an action of trespass, assault, and battery.

In 1816, the defendant, then being about twelve years of age, shooting an arrow from a bow, struck the plaintiff and put out one of his eyes, the plaintiff being then between nine and ten years of age. The plaintiff and defendant were schoolmates. The boys attending the school were assembled near the school-house. One of them had a bow and arrow, with which he and the defendant had been shooting at a mark. Some remark was made by the plaintiff, when the defendant said, "I will shoot you," and took the bow and arrow from another boy who then held it. The plaintiff ran into the school-house and hid behind a fire-board standing before the fire-place in the school-room. The defendant followed to the door of the school-room, and saying, "See me shoot that basket," discharged the arrow. At that moment the plaintiff raised his head above the fire-board, and the arrow struck him. There was a basket standing on a desk in the direction that the arrow was aimed. When the arrow was shot, there were a number of boys in the school-room. There had been no quarrel between the boys. The plaintiff, however, on entering the school-house, was frightened, and said he was afraid he would be shot. The plaintiff suffered great

¹ *Alderson v. Waistell*, 1 C. & K. 358; *The Virgo*, 25 W. R. 397; *Nitro-Glycerine Case*, 15 Wall. 524 (*semble*); *Strouse v. Whittlesey*, 41 Conn. 559; *Sutton v. Bonnett*, 114 Ind. 243; *Holland v. Barch*, 120 Ind. 46 (see also *Bennett v. Ford*, 47 Ind. 264); *Harvey v. Dunlop*, Hill & D. 193; *Centre v. Finney*, 17 Barb. 94, *Seld. notes*, 80 *Accord*.

But one who by blasting throws rocks upon the plaintiff's land is liable in trespass *quare clausum fregit*, irrespective of negligence. *Central Co. v. Vandenheuk*, 147 Ala. 546; *Beesemer Co. v. Doak*, 152 Ala. 166; *Sloss Co. v. Salser* (Ala. 1909), 48 So. R. 374; *Birmingham Co. v. Grover* (Ala. 1909), 48 So. R. 682; *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 N. Y. 163; *St. Peter v. Denison*, 58 N. Y. 416; *Sullivan v. Dunham*, 161 N. Y. 290; *Holland House v. Baird*, 169 N. Y. 136, 140. And the rule is the same as to trespass to the person by blasting. *Holland House*, 161 N. Y. 290; *Turner v. Degnon Co.*, 99 N. Y. Ap. Div. 135. — ED.

pain for two months, became blind of one eye, and for five years was disabled from attending school in consequence of the weakness of sight of the other eye. His mother became a widow; and when the plaintiff was able to attend school, her poverty prevented his receiving an ordinary education. This suit was commenced in 1827, within a year after the plaintiff attained his age.

The judge charged the jury that the shooting the arrow in the school-room where there were a number of boys assembled was an unlawful act; that it appeared to him to have been, at the least, grossly negligent and unjustifiable; and that, if the jury thought so, they ought to find a verdict for the plaintiff, with damages. The defendant excepted. The jury found for the plaintiff, with \$180 damages, and a motion was now made to set aside the verdict.

By THE COURT, MARCY, J. It is not, I apprehend, necessary for us to say whether the judge erred or not in his remark to the jury that, under the circumstances of the case, the act of the defendant in shooting the arrow in the school-room, where there were a number of scholars, was not lawful; for, if the act in itself was lawful, and there was not a proper care to guard against consequences injurious to others, the actor must be held responsible for such consequences.

In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another, it was holden to be a trespass. Year-Book, 21 H. VII. fol. 28. So where a number of persons were lawfully exercising themselves at arms, one, whose gun accidentally went off, was held liable in trespass for the injury occasioned by the accident. *Weaver v. Ward*. Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. *Leame v. Bray*.¹ It is decided in the case of *Wakeman v. Robinson*, if the accident happen entirely without the fault of the defendant, or any blame being imputable to him, an action will not lie. In that case, the blame imputable to the defendant was, that, his horse being young and spirited, he used him without a curb rein; that in his alarm he probably pulled the wrong rein; and that he ought to have continued on in a straight course. The blame fairly imputable to the defendant, it will be perceived, must have been slight indeed, as it certainly was in the case of the injury done by the glancing of the arrow when shooting at a mark (a lawful act), and by the accidental discharge of the musket at a training; and yet, in each of these cases, an action for the injury was maintained. Unless a rule is to be applied to this case different from that applicable to a transaction between adults, the proof was most abundant to charge the defendant with the consequences of the injury. Infants, in the same manner as adults, are liable for trespass, slander, assault,

¹ 3 East, 593.

&c.¹ Bing. on Infancy, 110; 8 T. R. 335; 16 Mass. Rep. 389; 2 Inst. 328. Where infants are the actors, that might probably be considered

¹ The liability of an infant for his torts is universally recognized.

TRESPASS. Y. B. 35 Hen. VI. f. 11, pl. 18; Burnand v. Harris, 14 C. B. N. S. 45; Neal v. Gillett, 23 Conn. 437; Wilson v. Garrard, 59 Ill. 51; Peterson v. Haffner, 59 Ind. 130; Scott v. Watson, 46 Me. 362; Marshall v. Wing, 50 Me. 62; Sikes v. Johnson, 16 Mass. 389; School District v. Bragdon, 23 N. H. 507; Campbell v. Stakes, 2 Wend. 137; Hartfield v. Roper, 21 Wend. 615, 620; Tift v. Tift, 4 Den. 175; Conklin v. Thompson, 29 Barb. 218; Huchting v. Engel, 17 Wis. 230; Vosburg v. Putney, 80 Wis. 523; Vosburg v. Putney, 86 Wis. 278.

TROVER. Mills v. Graham, 1 B. & P. N. R. 140; Bristow v. Clark, 1 Esp. 173; Vase v. Smith, 6 Cranch, 226; Oliver v. McClellan, 21 Ala. 675; Ashlock v. Vivell, 29 Ill. Ap. 388; Lewis v. Littlefield, 15 Me. 233; Caswell v. Parker, 96 Me. 39 (*semble*); Homer v. Thwing, 3 Pick. 492; Walker v. Davis, 1 Gray, 506; Wheeler Co. v. Jacobs, 21 N. Y. Sup. 1006; Green v. Sperry, 16 Vt. 390; Baxter v. Bush, 29 Vt. 465.

CASE FOR DECEIT. Fitts v. Hall, 9 N. H. 441; Wood v. Vance, 1 N. & McC. 197.

CASE FOR DEFAMATION. Hodsman v. Grissell, Noy, 129; Fears v. Riley, 148 Mo. 49.

CASE FOR NEGLIGENCE. Humphrey v. Douglass, 10 Vt. 71 *Accord*.

See, further, Robbins v. Mount, Robt. 553, 560; Hanks v. Deal, 3 McC. 257.

In Scott v. Watson, *supra*, Appleton, J., said: "Nor is his infancy any defence, for infants are liable for torts. . . . The parent is not answerable for the torts of his minor child, committed in his absence and without his authority or approval, but the minor is answerable therefor. Tift v. Tift, 4 Denio, 177. The minor is not exempt from liability, though the trespass was committed by the express command of the father. Humphrey v. Douglass, 10 Vt. 71.

"Nor can the defendant derive any support from the scriptural injunction to children of obedience to their parents, invoked in defence. No such construction can be given to the command, 'Children, obey your parents in the Lord, for this is right,' as to sanction or justify the trespass of the son upon the land of another, and the asportation of his crops, even though done by the express commands of his father. The defence is as unsound in its theology as it is baseless in its law." (a)

May, J., dissented, saying: "I am not quite satisfied with either the law or the theology of the opinion in this case. That sins of ignorance may be winked at, is both a dictate of reason and of Scripture. It is true, as a general rule, that infants who have arrived at the age of discretion are liable for their tortious acts. But, for the protection of infants, ought not the rule to be limited to cases where the infant acts under such circumstances that he must know or be presumed to know that the acts which he commits are unauthorized and wrong, when it appears that in the commission of the acts he was under the control and direction of his father? Will not an opposite doctrine tend to encourage disobedience in the child, and thus be subversive of the best interests of the community? Will it not also tend to subject him to embarrassment and insolvency when he shall arrive at full age? If all the members of a family under age are to be held liable in trespass or trover for the food which they eat, when that food is in fact the property of another, but, being set before them, they partake of it, in ignorance of such fact, by the command or direction of the parent, and under the belief that it is his, will not such a doctrine be in conflict with the principle that the common law is intended as a shield and protection against the improvidence of infancy? While the decided cases upon this subject seem to be limited to cases of contract, is there not the same reason for extending it, and applying it to cases like the one before us? In all the cases which I have examined in which infants have been held liable, the proof shows acts of positive wrong committed under circumstances where the infant must have known the nature and character of his acts. If the doctrines of the opinion are to prevail in a case like this, then the common law is but the revival of the old

(a) Smith v. Kron, 96 N. Ca. 392, 397; Humphrey v. Douglass, 10 Vt. 71; Huchting v. Engel, 17 Wis. 230 *Accord*. — Ed.

an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case. The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics, as we see by the case reported in Hobart, are responsible in the action of trespass for injuries inflicted by them. 1 Chit. Pl. 66.

Motion for a new trial denied.¹

GEORGE BROWN v. GEORGE K. KENDALL.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM,
1850.

[Reported in 6 Cushing, 292.]

THIS was an action of trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before Wells, C. J., in the Court of Common Pleas, that two dogs, belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two towards the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backwards from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back towards him, in raising his stick over his shoulder, in order to strike the dogs, he accidentally hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The defendant requested the judge to instruct the jury, that "if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

doctrine that the parents, by eating sour grapes, have set the children's teeth on edge. The rule that a servant who acts in ignorance of the rights of his principal is to be held liable for his acts, does not fall within the principles for which I contend." — ED.

¹ Welch v. Durand, 36 Conn. 182; Flinn v. State, 24 Ind. 286; Paterson v. Hafner, 59 Ind. 130; Mercer v. Corbin, 117 Ind. 450; Commonwealth v. Lister, 15 Phila. 405; Vosburg v. Putney, 80 Wis. 523; Vosburg v. Putney, 86 Wis. 278 Accord. — ED.

The defendant further requested the judge to instruct the jury, that, "under the circumstances, if the plaintiff was using ordinary care and the defendant was not, the plaintiff could not recover, and that the burden of proof on all these propositions was on the plaintiff."

The judge declined to give the instructions, as above requested, but left the case to the jury under the following instructions: "If the defendant, in beating the dogs, was doing a necessary act, or one which it was his duty under the circumstances of the case to do, and was doing it in a proper way; then he was not responsible in this action, provided he was using ordinary care at the time of the blow. If it was not a necessary act; if he was not in duty bound to attempt to part the dogs, but might with propriety interfere or not as he chose; the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word inevitable not in a strict but a popular sense."

"If, however, the plaintiff, when he met with the injury, was not in the exercise of ordinary care, he cannot recover, and this rule applies, whether the interference of the defendant in the fight of the dogs was necessary or not. If the jury believe, that it was the duty of the defendant to interfere, then the burden of proving negligence on the part of the defendant, and ordinary care on the part of the plaintiff, is on the plaintiff. If the jury believe, that the act of interference in the fight was unnecessary, then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, is on defendant."

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

This case was argued at the sittings in Boston, in January last, by *J. G. Abbott*, for the defendant, and by *B. F. Butler* and *A. W. Furr*, for the plaintiff.

SHAW, C. J. This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this Commonwealth by statute, which provides that actions of trespass for assault and battery shall survive.¹

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the

¹ Rev. Sta. c. 92, § 7.

term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis* lies; if consequential only, and not immediate, case is the proper remedy. *Leame v. Bray*,¹ *Huggett v. Montgomery*.²

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. In the principal case cited, *Leame v. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent, if not unlawful. In the course of the argument of that case (p. 595), Lawrence, J., said: "There certainly are cases in the books, where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the proposition may be true, because though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597), "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault*; for if the injury was unavoidable, and the conduct of the

¹ 3 East, 598.

² 2 N. R. 446, Day's Ed., and notes.

defendant was free from blame, he will not be liable.¹ *Wakeman v. Robinson*. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis v. Saunders*,² *Vincent v. Stinehour*.³ In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or, as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and that the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and

¹ 2 Greenl. Ev. §§ 85-92.

² 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.) and notes.

³ 7 Vt. 69.

the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained, not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it.¹ *Powers v. Russell*,² *Tourtellot v. Rosebrook*.³

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover. *New trial ordered*.⁴

¹ 2 Greenl. Ev. § 85.

² 13 Pick. 69, 76.

³ 11 Met. 460.

⁴ Nitro-Glycerine Case, 15 Wall. 524, 538 (*semble*); *Morris v. Platt*, 32 Conn. 75, 84-90 (defendant in defending himself lawfully against A. fired a pistol at A., but accidentally hit the plaintiff); *Paxton v. Boyer*, 67 Ill. 132 (facts similar to those in *Morris v. Platt*, *supra*) (*Crabtree v. Dawson*, 119 Ky. 148), *Accord.* — Ed.

BASELY v. CLARKSON.

IN THE KING'S BENCH, MICHAELMAS TERM, 1681.

[Reported in 3 Levinz, 37.]

TRESPASS for breaking his close called the balk and the hade, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff; and in mowing his own land he involuntarily and by mistake mowed down some grass, growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, &c., *quæ est eadem, &c.* *Et quod ante emanationem brevis* he tendered to the plaintiff 2s. in satisfaction; and that 2s. was a sufficient amends. Upon this the plaintiff demurred, and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable: they cannot be known.

HIGGINSON v. YORK.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE TERM, 1809.

[Reported in 5 Massachusetts Reports, 341.]

TRESPASS for breaking and entering the close of the plaintiffs, called Burnt Coat Island, and taking and carrying away three hundred cords of the plaintiffs' wood.

Upon the general issue pleaded and joined, the action was tried at the sittings after the last June term in this county, and a verdict found for the plaintiff, subject to the opinion of the court upon the following facts contained in the judge's report.

In the year 1805, the defendant, being master of a vessel regularly employed in the coasting trade, was applied to by one Kenniston, who was then a trader in the town of Sedgwick, to take a cargo of wood from the said island to Boston. He accordingly went to the island with Kenniston, took on board his vessel thirty or forty cords of wood, and carried the same to Boston, where it was sold, and the proceeds thereof accounted for by the defendant to Kenniston.

It was also in evidence that one Phinney, without right or authority, had cut the wood in question, and sold it to Kenniston, previously to his agreement with the defendant to carry it to Boston.

There was no evidence that the defendant had any knowledge of the trespass committed by Phinney, or that he was in any manner concerned, or aiding or assisting therein, other than by going to the island,

and taking the wood upon freight as aforesaid. The title of the plaintiffs to the island was not questioned.

The cause was submitted without argument. The court did not hesitate in giving their opinion in favor of the action, observing that the defendant was clearly a trespasser in going, without the license of the owner, upon the island of the plaintiffs; and supposing his taking the wood there to be a mistake as to the rights of Kenniston, and that under this mistake K. had been paid the full value of the wood taken by York, neither the mistake nor the accommodation, as being between joint trespassers, was any answer to the lawful owner, sustaining the injury to his soil or the loss of his chattels. For when taken, the wood, being cut and separated from the soil, was the personal property of the plaintiffs.

The doubt in this case, which probably occasioned it to be reserved, was a mistaken apprehension that K. & Y. were to be constructively connected with Phinney in his original trespass in cutting the wood. But the causes of action are entirely distinct. P. acquired no property in the wood by cutting it, as against the owners of the soil; K. could acquire none from him, and could transfer none to the present defendant; and these last broke the close of the plaintiffs in going upon their island, and were trespassers, and as such are chargeable in damages, at least to the value of the wood taken and carried away.

Judgment according to the verdict.¹

WAKEMAN v. ROBINSON.

IN THE COMMON PLEAS, APRIL 29, 1823.

[Reported in 1 Bingham, 213.]

TRESPASS for driving against plaintiff's horse, and injuring him with the shaft of a gig. Plea: General issue. There was also a special plea, which was not supported by the defendant's evidence at the trial.

The case then made out (London sittings after last Michaelmas term) was as follows:—

The plaintiff's wagon and horses were proceeding slowly along their proper side of the road towards London. The defendant was coming from London in a gig, at the rate of seven or eight miles an hour. When the defendant was near the plaintiff's wagon, a coach proceeding towards London approached them on the side of the road oppo-

¹ Russell v. Irby, 13 Ala. 131; Givens v. Kendrick, 15 Ala. 648; Allison v. Little, 85 Ind. 512 (*semble*); Brown v. Neal, 36 Me. 407; Atlantic Co. v. Maryland Co., 62 Md. 135; Perkins v. Hackleman, 26 Miss. 41; Pearson v. Inlow, 20 Mo. 322; Herdic v. Young, 55 Pa. 176; Luttrell v. Hazen, 3 Sneed, 20; Small v. Ball, 47 Vt. 486; Hazleton v. Week, 49 Wis. 661 *Accord.* — ED.

site to that which was occupied by the wagon. The defendant drove between the coach and the wagon; and though in the interval there was room for two or three carriages abreast, the horse of the defendant plunged, and, running the shaft of the gig against one of the plaintiff's wagon horses, so injured him that he afterwards died.

The defence set up was that the defendant's horse, being frightened by the near, noisy, and rapid approach of a butcher's cart, became ungovernable; that the injury being thus occasioned by unavoidable accident, without any negligence or default on the part of the defendant, he was not in any way responsible for the consequences. The weight of evidence, however, went to establish that the defendant's horse was young and spirited; that he had no curb-chain; that the defendant in his alarm pulled the wrong rein; and that he ought to have continued in a straight course, allowing the coach to pass between him and the wagon.

The learned judge who presided directed the jury, after a full summing up, that, this being an action of trespass, if the injury was occasioned by an immediate act of the defendant, it was immaterial whether that act was wilful or accidental. He did not direct them to consider whether the accident was occasioned by any negligence or default on the part of the defendant, or was wholly unavoidable; nor was he requested to do so by the defendant's counsel. The jury found a verdict for the plaintiff.

Pell, Serjt., now moved for a new trial, on the ground of an alleged misdirection.

Vaughan, Serjt., opposed the rule.¹

DALLAS, C. J. If the accident happened entirely without default on the part of the defendant, or blame imputable to him, the action does not lie; but, under all the circumstances that belong to it, I regret that this case comes before the court. The action was trespass, and the trespass was clearly made out against the defendant. It has been contended, indeed, that the defendant would not have been liable under any form of action; but, upon the facts of the case, if I had presided at the trial, I should have directed the jury that the plaintiff was entitled to a verdict; because the accident was clearly occasioned by the default of the defendant. The weight of evidence was all that way. I am now called upon to grant a new trial, contrary to the justice of the case, upon the ground that the jury were not called on to consider whether the accident was unavoidable, or occasioned by the fault of the defendant. There can be no doubt that the learned judge who presided would have taken the opinion of the jury on that ground, if he had been requested so to do; and, under all the circumstances, I am of opinion that a new trial ought not to be granted in this case.

BURROUGH, J., concurred, and the rule was discharged.²

¹ The arguments of counsel are omitted. — *Ed.*

² *Payne v. Smith*, 4 Dana, 497 *Accord.* — *Ed.*

HOBART v. HAGGET.

SUPREME JUDICIAL COURT, MAINE, APRIL TERM, 1835.

[Reported in 3 *Fairfield*, 67.]

TRESPASS for the alleged taking and converting to his own use by the defendant, of an ox, the property of the plaintiff. The general issue was pleaded and joined. *Verdict for the plaintiff.*¹

PARRIS, J. The ox taken by the defendant was the property of the plaintiff; and although the defendant attempted to prove that he purchased that ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser; but unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question, when, in fact, the plaintiff supposed he was not selling that ox, but another, that they would find for the plaintiff. The jury, having found for the plaintiff, have virtually found that he did not sell the ox in controversy; and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that, where the act complained of is involuntary and without fault, trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking of the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes by mistake the property of B., intend to commit a trespass; nor does he intend to become a trespasser who, believing that he is cutting timber on his own land, by mistaking the line of division, cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson v. York* was still stronger than either of those above supposed. In that case one Kenniston hired the defendant to take a cargo of wood from Burnt Coat Island to Boston. Kenniston went with the defendant to the island, where the latter took the wood on board his vessel and transported it to Boston, and accounted for it to Kenniston. It turned out on trial that one Phinney had cut this wood on the plaintiff's land without right or authority, and sold it to Kenniston. York, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by Phinney. A

¹ The statement of facts, the arguments of counsel, and a part of the opinion not relating to trespass are omitted. — ED.

mistake will not excuse a trespass. Though the injury has proceeded from mistake, the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely v. Clarkson*. Nor is the intent or design of the wrong-doer the criterion as to the form of remedy, for there are many cases in the books where, the injury being direct and immediate, trespass has been holden to lie though the injury were not intentional, as in *Guille v. Swan*,¹ where the defendant ascended in a balloon which descended into the plaintiff's garden; and the defendant, being entangled and in a perilous situation, called for help, and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damage done to the garden. In this case *Spencer, C. J.*, said, "The intent with which an act is done is by no means the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See also 1 Pothier, art. 1, § 1; 1 Sumner, 219, 307.

These exceptions are overruled, and there must be

*Judgment on the verdict.*²

¹ 19 Johns. 381.

² *Hamilton v. Hunt*, 14 Ill. 472; *Stanley v. Gaylord*, 1 Cush. 536, 551; *Sinclair v. Tarbox*, 2 N. H. 135; *Johnson v. Stone*, 40 N. H. 197; *Cate v. Cate*, 44 N. H. 211; *Gray v. Stevens*, 28 Vt. 1; *Daxter v. Cole*, 6 Wis. 319 *Accord*.

A sheriff is liable for arresting the wrong man, although having the same name as the one named in the warrant. *Clark v. Winn*, 19 Tex. Civ. Ap. 223. — Ed.

SECTION VI. (*continued.*)

(b) LEAVE AND LICENSE.

LATTER v. BRADDELL, WIFE, AND ANOTHER.

IN THE COMMON PLEAS DIVISION, NOVEMBER 26, 27, 1880.

[Reported in 50 Law Journal Reports, Common Law, 166.]

THIS was an action for damages for an assault, tried before Lindley, J., at the last Manchester assizes. At the trial the learned judge withdrew the case from the jury as against Captain and Mrs. Braddell, on the ground that there was no evidence of the non-consent of the plaintiff on which the jury could reasonably act. The jury found a verdict for the defendant, the doctor. A rule was obtained calling on the defendants to show cause why the verdict should not be set aside and a new trial had on the ground that the learned judge wrongly withdrew the case from the jury as against the defendants Braddell, and that the verdict was against the weight of evidence.

The facts and arguments appear sufficiently from the judgment delivered.

Addison showed cause.

Murphy and *Jordan* supported the rule.

The following cases were cited in support of the argument against the rule: *Christopherson v. Bare*¹; *The Queen v. Lock*.²

The following judgment was (on Dec. 3) delivered by

LINDLEY, J. I am of opinion that, assuming everything said by the plaintiff in this case to be true, a verdict in her favor against the master and mistress could not be supported in point of law, and that as to them she was properly nonsuited.

The plaintiff was in service with the defendants Braddell, who on their return after an absence from home received information from the charwoman which caused Mrs. Braddell to bid the plaintiff leave her service by twelve o'clock on the day that order was given, as she was in the family way. The plaintiff denied this, and Mrs. Braddell then said, "Well, the doctor will be here directly, and we shall then see." The plaintiff was then told to go to her bedroom, and she went, whither the doctor on his arrival followed her. He told her to take off her garments, which she did, saying, however, "Must I take off this?" or that she "did not like to take off that," as each article of clothing had to be removed by her under the doctor's directions. She also said that she cried and protested, and that it was all done without her consent. The examination was, however, submitted to by her, and the doctor

¹ 11 Q. B. Rep. 473; 17 Law J. Rep. Q. B. 109.

² 42 Law J. Rep. M. C. 5; Law Rep. 2 C. C. R. 10.

found that the plaintiff was not in the family way. This is the assault complained of.

The plaintiff's case cannot be put higher than this, namely, that, without consulting her wishes, her mistress ordered her to submit to be examined by a doctor, in order that he might ascertain whether she (the plaintiff) was in the family way, and that she (the plaintiff) complied with that order reluctantly — that is, sobbing and protesting — and because she was told she must, and she did not know what else to do. There was, however, no evidence of any force or violence, nor of any threat of force or violence, nor of any illegal act done or threatened by the mistress beyond what I have stated; nor did the plaintiff in her evidence say that she was in fear of the mistress or of the doctor, or that she was in any way overcome by fear. She said she did not consent to what was done; but the sense in which she used this expression was not explained, and to appreciate it regard must be had to the other facts of the case. The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress's orders, and there was no evidence whatever to show that anything improper or illegal was threatened to be done if she had not complied. It was suggested that her mistress ordered the examination with a view to see whether she could dismiss her without paying a month's wages. But there was no evidence of any threat to withhold wages, nor of any conversation on the subject of wages, until the plaintiff was paid them on leaving. The question, therefore, is reduced to this: Can the plaintiff, having complied with the orders of her mistress, although reluctantly, maintain this action upon the ground that what was done to her by the doctor was against her will, or might properly be so regarded by a jury? I think not. It is said that the jury ought to have been asked whether the plaintiff in effect gave her mistress leave to have her examined, or whether the plaintiff's will or mind went with what she did. But, in my opinion, such questions inadequately express the grounds on which alone the defendants can be held liable. The plaintiff was not a child; she knew perfectly well what she did and what was being done to her by the doctor. She knew the object with which he examined her, and upon the evidence there is no reason whatever for supposing that any examination would have been made or attempted if she had told the doctor she would not allow herself to be examined. Under these circumstances I am of opinion that there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress's orders, and that in the absence of all evidence of coercion, as distinguished from an order which the plaintiff could comply with or not as she chose, the action cannot be maintained.

I have examined all the decisions I can find on assault, battery, duress and allied subjects, but I can find no authority in support of such an action as this. The cases most favorable to the plaintiff are those like *Atkinson v. Denley*,¹ in which money paid under compulsion

¹ 6 Hurl. & N. 778; affirmed 7 *ibid.* 934; 30 Law J. Rep. Exch. 361.

in the sense of unfair or improper dictation or oppression has been recovered back. But in all such cases there has been another element, namely, either mistake or no consideration, or an illegal consideration, for the payment in addition to the element of coercion; and, in my opinion, such cases are no guide for the proper determination of an action for assault and battery.

A question somewhat like this arose incidentally in *Biffin v. Bignell*,¹ in which a jury had to consider whether a wife had been forced by her husband to live apart from him. She had been properly confined in a lunatic asylum. Shortly before she was discharged her husband offered her an allowance if she would live apart from him, but if she would not he said he would send her to another asylum. She accepted his terms, came out of the asylum and lived apart from her husband, who paid her the stipulated allowance, but who was afterwards sued for her board and lodging. Baron Bramwell told the jury that the agreement would not be binding on the wife if her assent to it was obtained by the threat that if she did not consent she would be sent to another asylum. But the court held that this was a misdirection, on the ground that the threat, such as it was, did not amount to duress or anything like.

In the present case there was no evidence of any threat at all, in the event of non-compliance with the orders of the mistress; and it appears to me that there was no evidence to show that Mrs. Braddell did anything illegal, or, in other words, to show that what she ordered to be done was done against the plaintiff's will in any accurate sense of that expression. This, however, is what has to be established. See *Christopherson v. Bare*.²

I do not, however, wish to be understood as being of opinion that the plaintiff had no cause of complaint against her mistress; but, in my opinion, the real substantial grievance was that the plaintiff accused of being in the family way was ordered to be examined, and when the accusation proved to be unfounded was summarily dismissed without any apology. Whether the mistress could or could not have justified such harsh conduct I cannot say, not having heard her evidence. But, harsh as such conduct apparently was, it does not affect the question on which this action turns. I cannot, however, help thinking that if the conduct of the mistress as regards the manner of dismissal had been more considerate, the impossibility of maintaining this action would be more plainly apparent.

As regards the doctor, who is made a defendant, I am of opinion, for the reasons already given, that there was no misdirection in point of law, and that the verdict in his favor was perfectly correct. His conduct throughout was kind and considerate; and whatever grievance the plaintiff may have against her mistress, she has none

¹ 7 Hurl. & N. 877; 31 Law J. Rep. Exch. 189.

² 11 Q. B. Rep. 473; 17 Law J. Rep. Q. B. 109.

whatever against the doctor. This action has been tried twice, and although I am extremely reluctant to adhere to my own opinion when other persons who are more likely than I am to be right think I am wrong, I cannot give my voice for further litigation in a case in which I feel convinced no injustice has been done.

I am of opinion that this rule ought to be discharged.

*Rule discharged.*¹

HEGARTY v. SHINE.

IN THE COURT OF APPEAL, IRELAND, DECEMBER 2, 1878.

[*Reported in Law Reports, 4 Irish, 288.*]

THE LORD CHANCELLOR.² This action is brought by a female plaintiff against a male defendant for breach of promise of marriage, and for assault of the plaintiff, and infecting her with venereal disease; the second ground of complaint being stated in two counts, of which the first is expressed that the defendant assaulted and beat the plaintiff, whereby she became infected with venereal disease, and the second, that the defendant assaulted and beat the plaintiff, and infected her with venereal disease. Of the first cause of action (for breach of promise of marriage) there was upon the trial no evidence. The rest of the complaint was founded upon the following facts: Between the plaintiff and the defendant there had for about two years subsisted an illicit intercourse, and during its continuance the plaintiff contracted from the defendant disease. As the questions to be decided by us arise upon the charge of the learned judge before whom the trial took place, and in respect of the view taken by him of the legal considerations applicable to a case of this character, I think it unnecessary to enter into the details of the evidence. There was a verdict for the plaintiff, but, if the jury were misdirected, of course it cannot be upheld. The charge is reported by the learned judge in the terms which I shall now state:—

“I charged the jury, carefully reviewing the evidence. Without expressing any opinion on my own part, I adopted as law, and, as applicable to a civil action, the cases of *Reg. v. Bennett*,³ and *Reg. v. Sinclair*,⁴ and I in substance directed the jury, as matter of law, that an assault implied an act of violence committed upon a person against

¹ The dissenting opinion of LOPES, J., is omitted. The Court of Appeal (BRAMWELL, BAGGALLAY, and BRETT, L. J.) sustained Mr. Justice Lindley. 50 L. J. C. L. 448.—ED.

² PALLES, C. B., and DEASY, L. J., concurred with the Lord Chancellor (the Right Hon. John Thomas Ball). Their opinions and the arguments of counsel are omitted.—ED.

³ 4 F. & F. 1105.

⁴ 13 Cox, C. C. 28.

his or her will, and that, as a general rule, when the person consented to the act there was no assault; but that if the consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in the view of the law an assault; and that therefore, if the defendant, knowing that he had venereal disease, and that the probable and natural effect of his having connection with the plaintiff would be to communicate to her venereal disease, fraudulently concealed from her his condition, in order to induce, and did thereby induce, her to have connection with him, and if but for that fraud she would not have consented to have had such connection, and if he had with her the connection so procured, and thereby communicated to her such venereal disease, he had committed an assault, and one for which they might on the evidence award substantial damages."

This charge and the objections to it were brought before the Queen's Bench Division, when a majority of the judges held that the views presented by the learned judge to the jury (not, indeed, according to his own opinion, but in deference to the authority of the two cases in the criminal courts cited by him) were a misdirection, and they consequently awarded a new trial upon this ground. The propriety of this ruling we have now to examine.

The charge of the learned judge assumes that, in order to constitute an assault upon a person, the act done should be against his or her will, without his or her consent. With that proposition I entirely agree. To strike a person minaciously or in anger is a matter very different in character from a blow in sport or play. Sexual intercourse with the consent of the female (supposing no grounds for invalidating that consent) cannot be an assault on the part of the male. The charge then proceeds to assert that although consent be given, yet if that consent was obtained by the fraud of the party committing the act, the fraud vitiated the consent, and the act became in view of the law an assault. From this proposition, when laid down in reference to the particular facts of the present case, I dissent. We are not dealing with deceit as to the nature of the act to be done, such as occurred in the instance cited in argument, of the innocent girl who was induced to believe that a surgical operation was being performed. There was here a lengthened cohabitation; deliberate consent to the act or acts, out of which the cause of action has arisen. If deceit by one of the parties to such a cohabitation as to the condition of his health suffices to alter the whole relation between them, so as to transform their intercourse into an assault on his part, why should not any other deceit have the same effect? Suppose a woman to live with her paramour, under and with a distinct and reiterated promise of marriage, not fulfilled, nor, it may be, ever intended to be fulfilled — is every separate act of sexual intercourse an assault? Let the same happen in conjunction with a violated engagement to provide for her maintenance and protection against poverty — does a similar consequence here also follow? No one, I think, would be prepared to answer these questions in the affirmative.

In the present case, the fraud relied upon to annul the plaintiff's consent is the concealment of a fact which if known would have induced her to withhold it; but before this effect is attributed to such concealment, it seems to me reasonable to demand — what is required in contract — that from the relation between the parties there should have arisen a duty to disclose, capable of being legally enforced. And how can this be, when the relation is itself immoral and for the indulgence of immorality; the supposed duty with the object of aiding its continuance? To support obligation founded upon relation, it appears to me the relation must be one that we can recognize and sanction. I do not think these opinions conflict with the cases in criminal courts referred to by the learned judge in his charge. Considerations affect prosecutions not applicable to civil actions. In the former we are concerned with public interests and consequent public policy; in the latter, with the reciprocal rights and liabilities of individuals. Mutual consent to a prize-fight might prevent the pugilists having a remedy *inter se*; but would not make it less a breach of the peace, or exonerate those engaged from punishment.

These reasons, in my opinion, justify the order of the Queen's Bench Division directing a new trial upon the ground of misdirection by the learned judge. I think it right to add that I also concur with the majority of that court in holding an action of this character cannot be maintained. The consequence of an immoral act — the direct consequence — is the subject of complaint. Courts of justice no more exist to provide a remedy for the consequences of immoral or illegal acts and contracts, than to aid or enforce those acts or contracts themselves. Some striking illustrations of this are afforded by authorities cited in the argument of this appeal. Thus judges have refused to partition the plunder obtained by robbery, to acknowledge or protect property in an indecent book or picture, to compel payment of the wages of unchastity. Are the same tribunals to regulate the relative rights and duties of the parties to an illicit intercourse? No precedent has been cited, no authority suggested, for an action like the present; and I am not disposed to make, in the interest of immorality, either precedent or authority for it.

HAMILTON v. LOMAX.

SUPREME COURT, NEW YORK, MARCH, 1858

[Reported in 26 Barbour, 615.]

MOTION by the defendant in an action for seduction, to be discharged from arrest. The plaintiff, Janet Hamilton, was twenty, and the defendant, seventeen years of age. It appeared in evidence that the intimacy between the parties commenced at Toronto, Canada; that the parties

came to the city of New York together, under the pretended relationship of brother and sister; that they there had connection with each other, and the defendant promised to marry the plaintiff. The promise of marriage was corroborated by the evidence of a Mr. Nash, who heard the defendant say he intended to marry the plaintiff when he heard from his father, who lived at Manchester, in England.

INGRAHAM, J. No complaint is submitted, on the motion, if any has been served, and it is difficult to say whether the arrest was originally intended to have been for a breach of promise of marriage, or for seduction. Upon the argument of the motion, the plaintiff's counsel stated it was not for the breach of promise of marriage, and sought to sustain it for the seduction.

The evidence so fully establishes the infancy of the defendant that no attempt has been made to contradict it, and this fact has probably led to the abandonment of any proceeding for the breach of such a promise. The cases of *Hunt v. Peake*¹ and *Holt v. Ward*² fully establish that a promise of marriage by an infant is not binding, and an action for the breach thereof cannot be maintained. See also *Cameron v. Alebay*.³ The ground on which the plaintiff claimed to sustain the arrest was for the seduction, alleging that the plaintiff had been defrauded by the false promise of the defendant. In no instance, however, is a promise to do something *in futuro* sufficient to sustain an action for deceit. All promises to pay money in consideration of goods to be sold, or for services to be rendered, are of the same character; and although they are not performed, still no action for fraud can be maintained upon them: the action must be on the promise itself. This case does not show any representation, or any promise, other than the promise to marry. So careful have the courts been to keep these causes of action separate, that in a case for seduction it was held to be erroneous to admit evidence of a promise of marriage, in attempting to prove the seduction. *Gillet v. Mead*.⁴ No case has been cited to show that a person seduced could maintain an action for such seduction, because the person seduced assents thereto. The only mode in which the action has ever been maintained has been by bringing such action in the name of some person having a right to the services of the person seduced, and allowing damages to be recovered, not only for actual loss of service, but for a sum sufficient also to punish the seducer; but such action can never be maintained in the name of the party seduced.

In the present case, from the plaintiff's own statement, it appears that she is under twenty-one years of age, and lived with her mother. The latter has a right to bring an action for the loss of service of her daughter. In that action full recompense could be obtained for any injury caused by the defendant.

The statement of the plaintiff's first acquaintance with the defendant, as given by herself, is not of such a character as to relieve the

¹ 5 Cow. 475.

² 2 Strange, 937.

³ 1 Maul. 76.

⁴ 7 Wend. 198.

case from suspicion. She states that her first acquaintance with the defendant was in the streets of Toronto after dark, and that she remained with him three-quarters of an hour, in the street; and her subsequent statements of her relations with him throw much doubt upon any supposed attempts of the defendant to deceive her. It is enough, however, to say that the law does not give the plaintiff a right of action, in her own name, for the seduction. It may be that there are some cases where such an action, if allowed, would give a party the redress to which she is entitled; but the Legislature has not thought fit to authorize such an action to be brought, and until they do, the courts have no authority to sanction the bringing it. As the law now permits parties to be witnesses in their own behalf, some of the difficulties which have heretofore stood in the way of allowing a female who has been seduced to maintain an action in her own name have been obviated; but it is for the Legislature, and not the courts, to apply the remedy.

*The defendant must be discharged.*¹

PATRICK FITZGERALD v. JOHN CAVIN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1872.

[Reported in 110 *Massachusetts Reports*, 153.]

TORT for an assault. At the trial in the Superior Court, before Putnam, J., the plaintiff testified that the defendant seized hold of him by the testicles, and squeezed them severely. The defendant introduced evidence that "all that occurred happened in the course of fooling and 'playing with each other,' and that there was no malice, anger or hard words." It appeared that the plaintiff was seriously injured, but that a very slight force applied to the testicles might do serious injury, and that the plaintiff made no complaint until half an hour after the occurrence.

The defendant requested the judge to rule as follows: "1. If there was no malice on the part of the defendant and no intent to do the plaintiff any bodily harm, and if the parties were lawfully playing with one another, by mutual consent, and the *force used* [act done] by the defendant was no *greater* [other] than the defendant had good reason to believe would be in such play, the defendant is not liable." 2. Whether

¹ *Beseler v. Stephani*, 71 Ill. 400; *Woodward v. Anderson*, 9 Bush. 624; *Paul v. Frazier*, 3 Mass. 71; *Robinson v. Musser*, 78 Mo. 153; *Weaver v. Bachert*, 2 Barr, 80; *Conn. v. Wilson*, 2 Overt. 233 *Accord.* See *Desborough v. Homes*, 1 F. & F. 6.

An action is allowed by statute in some jurisdictions. *Marshall v. Taylor*, 98 Cal. 55; *Swett v. Gray*, 141 Cal. 83; *McIlvain v. Emery*, 88 Ind. 298; *Watson v. Watson*, 49 Mich. 540; *Hood v. Sudderth* (N. C. 1892), 16 S. E. R. 397. The Scotch law is to the same effect. *Smith, Law of Damages*, 123.

Even without a statute a guardian is liable in damages for the seduction of his ward. *Graham v. Wallace*, 50 N. Y. Ap. Div. 101. — Ed.

² *Vosburg v. Putney*, 80 Wis. 523, 527 *Accord.* — Ed.

or not the force used was reasonable, is not to be determined by the results, but from the evidence of the force used at the time and the circumstances of the occasion. 3. The plaintiff cannot recover unless it is proved that the defendant intended to do bodily harm."

The judge gave the first ruling requested, substituting the words in brackets for those in italics. He gave the second ruling requested, adding however these words "and the nature of the act done by the defendant." He refused to give the third ruling requested, and ruled "that if the defendant intended to do the act done by him, and that act was unlawful and unjustifiable" (instructing them as to when such an act would be unlawful and unjustifiable), "and the act caused bodily harm, the plaintiff could recover."

The jury returned their verdict for the plaintiff for \$933.33; and the defendant alleged exceptions.

By THE COURT. The rulings were sufficiently favorable to the defendant. *Exceptions overruled.*¹

WARTMAN v. SWINDELL.

IN THE COURT OF ERRORS AND APPEALS, NEW JERSEY,
NOVEMBER 14, 1892.

[Reported in 25 *Atlantic Reporter*, 356.]

VAN SYCKEL, J.² In September, 1891, the clerk of the plaintiff in error, who was plaintiff below, drove the horse and carriage of the plaintiff to the sheriff's office in Camden, and there tied the horse to a post at the curb line of the street. While the clerk was in the sheriff's office, the lines, worth about three dollars or four dollars, were taken from the horse by the defendant in error, and the clerk was left without the means of driving the horse. He thereupon demanded the lines of the defendant, who refused to return them to him. The clerk then went to the office of the plaintiff, and informed him of the occurrence, and was instructed to return to the court-house, and again demand the lines of the defendant. A second demand was made, and the defendant refused to comply with it. Thereupon the plaintiff brought suit against the defendant for damages. On the trial of the cause in the court below, the plaintiff, after proving the facts above stated, rested his case. On the cross-examination of the plaintiff's clerk it appeared that the defendant said to him that the plaintiff had taken a small article from the defendant, and the clerk, in reply to the question whether the defendant did not take the lines by way of a joke, said he "supposed perhaps he did it in a joke, but he did not know what it was

¹ See also *Markley v. Whitman* (Mich. 1893), 54 N. W. R. 763; *Reid v. Mitchell*, 12 R. (Court of Session, 1885) 1129. — Ed.

² Only the opinion of the court is given. — Ed.

done for when it was first done." When the plaintiff had rested his case, the trial judge said: "If the defendant will make a tender of these lines now, I will dismiss this case upon the ground *de minimis non curat lex*." The defendant thereupon tendered the lines to the plaintiff, and the court dismissed the jury from the further consideration of it. This disposition of the case is the error complained of in this court. The trial judge acted upon the idea that the conduct of the defendant was intended as a joke, and that the matter involved was too insignificant to claim the attention of the court. If the defendant relied upon the fact that he removed the lines by way of a joke, it was a question for the jury to decide whether the parties had been perpetrating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke. That question could not legally be taken from the jury, and settled by the court; nor, in my judgment, was the maxim *de minimis non curat lex* applicable to this case. In *Seneca Road Co. v. Auburn & R. R. Co.*,¹ Mr. Justice Cowen said this maxim is never applied to the positive and wrongful invasion of another's property. The right to maintain an action for the value of property, however small, of which the owner is wrongfully deprived, is never denied. A trespass upon lands is actionable, although the damage to the owner is inappreciable. The celebrated *Six Carpenters' Case*² involved a trifling sum. But as the case in hand stood at the close of the plaintiff's testimony, I am not prepared to say that a verdict for substantial damages would not have been justifiable. In my opinion, the trial court erred in dismissing this case, and the judgment below should therefore be reversed.

THE STATE v. WILLIAM BECK AND OTHERS.

IN THE COURT OF APPEALS, SOUTH CAROLINA, DECEMBER, 1833.

[Reported in 1 Hill, 363.]

TRIED before Mr. Justice Richardson, at Pickens.

Indictment for an assault and battery. The defendants were all acquitted, except William Beck. The facts were these—one of the defendants had lost leather, and suspecting it was stolen, got Beck and the other defendants to aid him in the search. They found the leather on the premises of Noble Anderson, and immediately took him into custody, whether under a warrant or not, did not appear. Whilst in this state, some one, not Beck, asked Anderson if he would not rather be whipped than go to jail? He replied he would, and then requested Beck to whip him. Beck at first hesitated, but finally, at the earnest entreaty of Anderson, and saying, "if it will oblige you I will do it," consented; and Anderson putting his arms round a tree, he gave

¹ 5 Hill, 175.

² 8 Coke, 432.

him a few stripes with a switch. Anderson was then released, but was afterwards prosecuted, convicted and punished for stealing the leather. Under these circumstances, the presiding judge charged the jury, that Beck was clearly guilty, and they found accordingly. He now moves for a new trial, on the ground that the whipping having been inflicted at the importunity of Anderson, and against the inclination of the defendant, was not an assault and battery.

Burt, for the motion.

Thompson, Sol., contra.

HARPER, J. We do not think the act in question amounts to an assault and battery, on the part of the defendant, Beck. A battery is generally defined to be, any injury done to the person of another, in a rude, insolent, or revengeful way. There is also another class of cases, where some degree of negligence may be imputed: as, where a person throwing stones into the highway, strikes another passing; or, as in the instance of a person throwing a lighted squib into a crowd. But where there is no intention to injure, and no negligence, I do not think the offence can be imputed. An instance commonly put, is that of a soldier firing his piece at muster, and, without any fault of his own, injuring another, casually and suddenly passing before it. A surgeon who, for his patient's health, cuts off a limb, is not guilty of mayhem; or if one plucks a drowning man out of a river by the hair of the head, this is no assault. If, according to the prescription of the physician in the Arabian Nights, a physician should beat his patient with a mallet, for the *bona fide* purpose of restoring his health, though this might be malpractice, it would be no battery. Where one gave another a license to beat him, there is a case in which it is said, the license was held to be void.¹ This may well be. The person receiving the license, entertained hostile dispositions towards the other, and upon being thus licensed, proceeded to carry his revengeful purpose into effect. But in the case before us, the defendant had no evil disposition towards Anderson, but the contrary; and at his own earnest request, and to save him from what he considered a greater evil, reluctantly consented to inflict the stripes. However ill judged the act may have been, I cannot think it constituted an assault and battery. The case might be different with respect to the other defendants who were acquitted; but as to the defendant before us, the motion for a new trial must be granted.

JOHNSON and O'NEALL, JJ., concurred.²

¹ Matthew v. Ollerton, Comb. 318. — Ed.

² "In State v. Beck, 1 Hill (S. Ca.), 363, the opinion contains statements of law in which we cannot concur." — Per ENDICOTT, J., in Commonwealth v. Colburg, 119 Mass. 350, 354. — Ed.

BELL v. HANSLEY.

SUPREME COURT, NORTH CAROLINA, DECEMBER TERM, 1855.

[Reported in 3 Jones, 131.]

THIS was an action of trespass, assault, and battery, tried before Ellis, Judge, at the fall term, 1855, of New Hanover Superior Court.

The plaintiff proved the assault and battery; and there was evidence tending to show a mutual affray and fighting by consent.

But his Honor was of opinion, and so advised the jury, that notwithstanding the fact that the parties had mutually assented to an affray, the plaintiff was, nevertheless, entitled to recover; but that the fact relied on as a defence was proper to be considered by the jury in mitigation of damages. The defendant excepted to these instructions.

Verdict for the plaintiff. Judgment and appeal.

NASH, C. J. This case presents the question whether, when two men fight together, thereby committing an affray, either is guilty of an assault and battery upon the other. Justice Buller, in his *Nisi Prius*, at page 16, says, Each does commit an assault and battery upon the other, and that each can maintain an action for it. He refers to a case at Abingdon, *Boulter v. Clark*, when Serjeant Hayward appeared for the defendant, and offered to prove that the parties fought by consent, and insisted that this, under the maxim *volenti non fit injuria*, applied. Parker, Chief Baron, denied it, and said, "The fighting being unlawful, the consent of the plaintiff to fight would be no bar to his action, and that he was entitled to a verdict." Mr. Stephens, in his *Nisi Prius*, 211, lays down the same doctrine: "If two men engage in a boxing match, an action can be sustained by either of them against the other, if an assault be made; because the act of boxing is unlawful, and the consent of the parties to fight cannot excuse the injury."

*Per Curiam. Judgment affirmed.*¹

¹ *Boulter v. Clarke*, Bull. N. P. 16; *Reg. v. Coney*, 8 Q. B. D. 534, 538, 546, 549, 567; *Logan v. Austin*, 1 Stewart (Ala.), 476; *Cadwell v. Farrell*, 28 Ill. 438; *Adams v. Waggoner*, 33 Ind. 531; *Lund v. Tyler*, 115 Iowa, 236; *McNeil v. Mullin*, 70 Kan. 640; *Grotton v. Glidden*, 84 Me. 589; *Commonwealth v. Colburg*, 119 Mass. 361 (*semble*); *Lizana v. Lang*, 90 Miss. 469; *Jones v. Gale*, 23 Mo. Ap. 637; *Morris v. Miller* (Neb. 1909), 119 N. W. R. 458; *Stout v. Wren*, 1 Hawks (N. Car.), 420; *Barholt v. Wright*, 45 Oh. St. 177 (explaining *Champer v. State*, 14 Oh. St. 437); *McCune v. Klein*, 60 Tex. 168 (*semble*); *Wiley v. Carpenter*, 64 Vt. 212; *Shay v. Thompson*, 59 Wis. 540 *Accord*.

Reg. v. Coney, 15 Cox, C. C. 46 (*semble*) *per* HAWKINS, J.; *Hegarty v. Shine*, L. R. 4 Ir. 268, 294 (*semble*) *Contra*. If the plaintiff is injured by the defendant, both being engaged in an illegal charivari party, he cannot recover damages from the defendant. *Gilmore v. Fuller*, 198 Ill. 130. — ED.

ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1436.

[*Reported in Year-Book, 14 Henry VI., folio 14, placitum 2.*]

FALSE IMPRISONMENT brought by a woman for an imprisonment in Fleet Street.

Newton. There was an agreement between the plaintiff and defendant at G. that the defendant should carry the plaintiff to Temple Bar, and thence to Southwark, in pursuance of which agreement he carried the woman to Temple Bar, and thence to Temple Bridge, and across the Thames to Southwark, which is the said imprisonment, &c.

This was held to be no plea, because it did not confess any imprisonment, for the carrying of a woman by her consent cannot be called an imprisonment. There cannot be an imprisonment, unless against her will. Nevertheless, the plaintiff passed over.

MOSES v. DUBOIS.

COURT OF APPEALS, SOUTH CAROLINA, FEBRUARY, 1838.

[*Reported in Dudley, 209.*]

THIS was an action for false imprisonment against the captain of a steamboat, for carrying Sol. Moses (deputy-sheriff) to Norfolk against his will.

The jury returned a verdict of one hundred dollars.¹

EARLE, J., delivered the opinion of the court:—

Every unlawful restraint of personal liberty is an imprisonment, whether accompanied by corporal touch or not; whether in a house, in a ship, or in the street. But force of some sort must be used, and it must be a detention against the will; and it is indispensable that these two circumstances should unite. The force may be exhibited in a variety of ways without actual assault or corporal touch,—by locking a door after enticing one within, and refusing to open it for his departure; by setting sail or pushing off from shore, having one on board, and refusing to allow him to go ashore; or by detaining one on the highway by threats of personal violence if he departed. And it is equally essential that the person should be detained against his will: for if he voluntarily place himself in a situation where another may

¹ The case is materially abridged. — Ed.

lawfully do that which has the effect of restraining liberty, especially if he refuse to depart when he may, he cannot complain that he is unlawfully imprisoned against his will.¹ A sheriff's officer goes to the house of A. on the evening of an entertainment, with a bail process against one of his guests, and enters, as he lawfully may, and makes the arrest, A. refusing to assist him, but offering no hinderance; being unable to remove his prisoner, he chooses to remain until the close of the entertainment, expecting then to accomplish his purpose on the departure of the guests; but the prisoner, being on a visit there, remains. The officer, being informed that the doors are about to be closed, is requested to depart with his prisoner, if he can take him, else without him; but he is unable to take, and refuses to go without him. If A. should lock his doors and retire to rest, could the officer complain of false imprisonment if A. should refuse to rise at a late hour of the night, at his request, to open the door? I should think not. If a man enters a tavern and continues there all night against the will of the landlord, it is a trespass, — could he complain if the landlord shuts his door upon him? The general rule is, that a trespass will not lie for a mere non-feasance; and it seems to follow from that proposition that when an act has been done, in the first instance lawful in itself, it cannot be rendered unlawful *ab initio*, except by some positive act incompatible with the exercise of the legal right to do the first act. 20 John. Rep. 429; 15 ib. 401. In the case made by the evidence it does not appear that the plaintiff was carried from the shore against his will, but the reverse. The destination of the boat was known,—the accustomed hour of departure was passed; the boat was in the act of getting under way; at that moment the plaintiff chose to go on board to arrest a person on a bail process, evidently under a mistaken impression as to the extent of his authority; and, seeing the boat leaving the wharf, he chooses to remain. Here, then, there was no unlawful detention, according to the principles I have laid down: the defendant was in the discharge of his known and accustomed duty, and therefore in the performance of a lawful act, and the plaintiff was not detained against his will. At what time did the false imprisonment commence? After the boat had proceeded into the stream some distance from the wharf, the defendant came and proposed to the plaintiff to send him ashore with his prisoner, if he could take him, else to send him alone. The plaintiff refused to go unless the defendant would aid him in carrying his prisoner. It need not be repeated that this the defendant was not bound to do. It was his duty to interpose no obstacle to the arrest or removal of the prisoner, but rather to afford such facilities as he could to the service of legal process. This he seems to have done, and more could hardly have been expected. On the refusal of the plaintiff to go ashore, the defendant proceeded on his voyage, — one on which the plaintiff knew the boat was in the act of departing when he went aboard. This was also the accustomed duty, the office of the defendant, and was therefore a lawful act.

¹ Balmain Ferry Co. v. Robertson, 4 Austral. C. L. R. 379 *Accord.* — Ed.

If the defendant was not bound to aid in the arrest and removal of the prisoner, I do not perceive that he was bound either to delay his voyage or put back his boat to enable the plaintiff to procure assistance. When the boat had arrived at the mouth of the harbor, near Sullivan's Island, the plaintiff demanded to be put ashore, which the defendant then refused; here commenced the detention of the plaintiff against his will. Was it unlawful? I think it cannot be so held; the defendant only proceeded on his voyage. His refusal to send the plaintiff ashore at that time, which would have delayed his progress and put him to trouble, was a mere non-feasance, which, if he had been guilty of no trespass up to that time, did not render him a trespasser *ab initio*: it was not a positive act, incompatible with the legal exercise of the right to proceed from the wharf, the plaintiff being on board.

*The motion for a new trial is granted.*¹

ADAMS v. FREEMAN.

IN THE SUPREME COURT, NEW YORK, OCTOBER, 1815.

[Reported in 12 Johnson, 408.]

IN ERROR, on *certiorari* to a justice's court.

This was an action of trespass, brought by the plaintiff in error against the defendant in error for entering the plaintiff's house. The defendant pleaded not guilty; and, on the trial, the plaintiff proved that, he being in bed (whether in the day time or at night is not stated), the defendant entered his house without permission. The plaintiff's son, by order of his father, requested the defendant to leave the house; to which the defendant answered that he would go when he pleased. The plaintiff's wife then ordered the defendant to go off, to which the defendant gave a similar answer. The plaintiff then rose from bed, and ordered the defendant to leave his house, but he still refused to go, and remained there half an hour, without doing any other injury, and then departed.

The defendant moved for a nonsuit, and the justice decided that the proof was insufficient to sustain the action, and nonsuited the plaintiff, with costs.

PER CURIAM. To enter a dwelling house without license is, in law, a trespass. Any person professing to keep an inn, thereby gives general license to all persons to enter his house. But the house of the plaintiff does not appear to have been an inn, and, therefore, to render such an entry lawful, there must be a permission, express or implied; and familiar intimacy may be evidence of general license for

¹ Spoor v. Spooner, 12 Met. 281 Accord. — Ed.

such purpose. According to the evidence, here was no such permission; and, therefore, the act of entering the plaintiff's house was a trespass. Besides, if the defendant had received permission to enter, as by being asked to walk in, upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*.

*Judgment reversed.*¹

¹ See *Ditcham v. Bond*, 3 Camp. 524; *McKone v. Mich. Co.*, 51 Mich. 601; *Haight v. Badgeley*, 15 Barb. 502; *Martin v. Houghton*, 45 Barb. 258; *Gowen v. Phila. Co.*, 5 Watts & S. 141, 143; *Kay v. Pennsylvania Co.*, 65 Pa. 273.

A purchaser of goods upon the seller's premises is authorized to enter and take them, unless the goods were by the bargain deliverable by the seller elsewhere. *Wood v. Manley*, 11 A. & E. 34; *Williams v. Morris*, 8 M. & W. 488; *Heflin v. Bingham*, 56 Ala. 566; *Russell v. Stoeckel*, 5 Houst. 464; *Miller v. State*, 39 Ind. 267; *Giles v. Simonds*, 15 Gray, 441; *McLeod v. Jones*, 105 Mass. 403; *Fletcher v. Livingston*, 153 Mass. 388.

A divorced wife may enter her former husband's house to get her personal property. *Kallock v. Perry*, 61 Me. 273.

One who enters upon the land of another under an unfounded claim of ownership cannot justify his entry under a license to enter given by the owner. *Strang v. Russell*, 24 N. Zeal. L. R. 916.—Ed.

SECTION VI. (*continued*).

(c) DEFENCE OF SELF AND CLOSELY ALLIED PERSONS.

ANONYMOUS.

AT THE ASSIZES, CORAM METINGHAM, J., 1294.

[*Reported in Year-Book, 21 and 22 Edward I., 586.*]

ONE Adam brought the *quare vi et armis* against B., saying that he tortiously, &c., and beat and wounded him, &c. B. said that he did not come with force and arms, &c., but that the said Adam, who now complains, came and attacked him, and would have slain him; so that if Adam did receive any harm from him, it was in his (B.'s) own defence, and that the matter was settled *in pais* for two marks; ready to aver it, &c. *Adam*. What have you to show that we settled the matter? *B.* A good jury. *Adam*. We think that this is not sufficient. *METINGHAM*. Answer if you settled the matter for two marks or not. *Adam*. We did not settle the matter; ready, &c. And the other side said the contrary. So, &c.

ANONYMOUS.

IN THE KING'S BENCH, EASTER TERM, 1319.

[*Reported in Year-Book, 12 Edward II., folio 381.*]

IN a plea of trespass for a battery, the defendant pleaded Not guilty. It was found by the inquest that the plaintiff was beaten, but this was because of his own assault, since the defendant could not otherwise escape; so that he brought this action out of malice; and the defendant prayed the discretion of the justices. It was nevertheless adjudged that the plaintiff should recover his damages according to the verdict of the inquest, and the defendant to go to prison. *Per* STAUNTON and HERLE.¹

¹ Compare Fleta, i. 23, § 15: "Sed si talis . . . convincatur per patriam, quod id fecit per infortunium vel se defendendo, tunc remittatur gaolæ et cum regi super facti veritate certietur, GRATIOSE DISPENSABIT cum tali, salvo jure cujuslibet." 1 Seld. Soc. Sel. Pl. Cor. (1219), No. 114, 3 Bract, Note Book (1236-37), No. 1216 and Y. B. 25 Ed. III, 86-87 are cases in point.

Y. B. 31 Ed. III, fol. 17, pl. 22: "Note that a man was found guilty of having killed another in self-defence, and nevertheless his chattels were forfeit, although his life was saved. This was because at common law a man was hanged in such a case straightway, just as if he acted feloniously. And although the king now by the statute has saved (*relesse*) his life, his chattels remain at common law." See Y. B. (Rolls Series) 15 Ed. III, 263 and Stephen, Cr. Law (3d ed.), 136.

That the early English law looked only at the act of a defendant, regardless of his

CHAPLEYN OF GREYE'S INNE v. —.

IN THE EXCHEQUER, MICHAELMAS TERM, 1400.

[Reported in Year-Book, 2 Henry IV., folio 8, placitum 40.]

IN an inquest by a chaplain of Grey's Inn for a battery done to him, &c. And the defendants had justified that the wrong which the plaintiff had was from his own assault. *Markham*. Although a man make an assault upon another, if he upon whom the assault is made can escape with his life, it is not lawful for him to beat the other, who made the assault, *quod tota curia concessit*. COCKAYN, C. B. But I am not bound to wait till the other has given a blow, for perhaps it will come too late afterwards, *quod conceditur*.¹

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1455.

[Reported in Year-Book, 33 Henry VI., folio 18, placitum 10.]

IN trespass *quare tales et tantas minas de vita sua et mutilatione membrorum suorum eidem querenti imposuit*, &c. *Hengston*. As to the coming with force, &c., and as to the threats, *son assault demesne*, &c. Ready, &c. PRISOT, C. J. This is no plea to the threats, without more; for if one assaults you to beat you, it is not lawful for you to say that you will kill him, and to threaten his life or limb; but if the case is one where he has you at such an advantage that by intentment he would kill you, as if you should flee from him, and he, being swifter than you, should pursue you so that you could not escape; or, again, if you are under him on the ground; or if he has chased you to a wall, or hedge, or dike, so that you cannot escape him, — then it is lawful for you to say that if he will not depart from you, you, to save your life, will kill him, and so you may threaten him for such special cause, &c., which cause should be a part of your plea. Wherefore, &c. *Hengston*. I will speak with my client with your leave, &c.

motive, seems clear from this note and the principal case. The same is true of the early Teutonic law in general, as is conclusively shown by Professor Heinrich Brunner in his essay "Ueber absichtlose Missethat im altdeutschen Strafrechte." Brunner, *Forschungen*, 487. — Ed.

¹ Self-defence seems to have been allowed as a bar to an appeal of mayhem in Y. B. 25 Ed. III, 85-22. — Ed.

ANONYMOUS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1505.

[Reported in Year-Book, 21 Henry VII., folio 39, placitum 50.]

NOTE BY FINEUX, C. J. If a man is in his house, and hears that such a one is coming to his house to beat him, he may well collect his friends and neighbors to help him in the defence of his person. But if one threatens to beat him if he goes to such a market or such other place, he may not lawfully collect his friends to protect him while going thither, because it is not necessary for him to go, and he may have his remedy by a bond to keep the peace. But one's house is his castle¹ and defence, where he may properly abide. And all the judges agreed that a servant may beat one in defence of his master. TREMAILE, J., said that a servant might kill another to save the life of his master, if the latter could not otherwise escape.

STATE v. JOHN P. SHERMAN AND OTHERS.

IN THE SUPREME COURT, RHODE ISLAND, OCTOBER 29, 1889.

*[Reported in 16 Rhode Island, 631.]*EXCEPTIONS to the Court of Common Pleas.²

DURFEE, C. J. This is a criminal complaint against John P. Sherman and others for assault and battery on the person of Charles C. Sherman. It comes up here on exceptions from the Court of Common Pleas.

The bill of exceptions shows as follows: The defendant, John P. Sherman, was occupying as tenant a tract of land bordering on a tidal cove connecting with Point Judith Pond, and the complainant, Charles C. Sherman, built a causeway of dirt and stones in the pond across the mouth of the cove, so as to close it, except for the space of about thirty feet at one end, where the water was shallow, thereby obstructing said defendant in the use of the water for ingress and egress to and from his land by boat. On the day of the assault said defendant, wishing to go out with his sail-boat, went upon the causeway to open a passage through the deeper part, and began work to that end. The complainant came down soon afterward to stop him, and the affray occurred.

¹ Laurence's Case (1609), 2 Roll. Ab. 548. "One may justify the battery of another who will enter my house, for it is my castle." See to the same effect Fossbinder v. Svitak, 16 Neb. 499. — Ed.

² A portion of the case, relating to procedure, is omitted. — Ed.

On trial in the Court of Common Pleas the complainant testified that, seeing the defendants tearing down the causeway, he ran to where said John P. Sherman was at work, and put his foot on a stone which said John P. was prying up with a crowbar; that said John P. raised the crowbar as if to strike him, whereupon he seized it in self-defence, and some one, he knew not who, knocked him down, and that said John P. twice threw him from the causeway into the water. His testimony was corroborated by other witnesses. On the other hand, said John P. testified that the complainant rushed down and seized him, that he never either struck or struck at him, but only pushed him away, using no more force than was necessary for self-protection, as the complainant repeatedly attacked him. Other witnesses corroborated him. He also testified that the open water at the end of the causeway was too shallow for him to pass without getting out of his boat and dragging it. After the case had been argued to the jury, he asked the court to instruct the jury as follows, to wit: "That a man in a public place, if attacked, may resist with his natural weapons, using no more force than is necessary, without retreating." The court refused, but did instruct them that in such a case a man must retreat, if he can safely, and that the defendant did not testify that there was anything to prevent his retreating. The defendant excepted to both the refusal and the instruction. The bill of exceptions sets forth that the complainant's counsel stated, in his argument to the jury, that he did not claim for the complainant the right to use any force to protect the causeway, or any force against the defendant, except such as he might lawfully use in any public place.

We think the court below erred. Generally a person wrongfully assailed cannot justify the killing of his assailant in mere self-defence, if he can safely avoid it by retreating.¹ Retreat is not always obligatory even to avoid killing; for if attack be made with deadly weapons, or with murderous or felonious intent, the assailed may stand his ground, and if need be kill his assailant. But there is no question of killing here, and we know of no case which holds that retreat is obligatory simply to avoid a conflict. Where there is no homicide, the rule generally laid down is, that the assaulted person may defend himself, opposing force to force, using so much force as is necessary for his protection, and can be held to answer only for exceeding such degree. Mr. Bishop, in his work on Criminal Law, § 849, says: "The assailed person is not permitted to stand and kill his adversary, if there is a way of escape open to him, while yet he may repel force by force, and, within limits differing with the facts of the case, give back blow for blow." See, also, 1 Wharton's Criminal Law, § 99; Stephen's Digest Criminal Law, art. 200; May's Criminal Law, Students' Series, § 62. Mr. May's language is: "There seems to be

¹ Page v. State, 141 Ind. 236; Shorter v. People, 2 N. Y. 193; State v. Dixon, 75 N. Ca. 275; Commonwealth v. Drum, 58 Pa. 1, 22 Accord. — Ed.

no necessity for retreating or endeavoring to escape from the assailant before resorting to any means of self-defence short of those which threaten the assailant's life." In *Commonwealth v. Drum*,¹ where the defendant, who was indicted for murder, set up that he acted in self-defence, the court in charging the jury used the following language: "The right to stand in self-defence without fleeing has been strongly asserted by the defence. It is certainly true that every citizen may rightfully traverse the street, or may stand in all proper places, and need not flee from every one who chooses to assail him. Without this our liberties would be worthless. But the law does not apply this right to homicide." There are cases, however, which manifest a disposition to apply the same rule generally. *Runyan v. The State*;² *Erwin v. State*.³

In *Gallagher v. The State*,⁴ the defendant was complained of for assault and battery, and set up in justification that he acted in self-defence, the complainant having stepped forward with his cane raised, as if about to strike. The lower court, on trial, ruled as follows: "Where a person is approached by another with a cane raised in a hostile manner, the former is not justified in striking unnecessarily, but is bound to retreat reasonably before striking." On error the Supreme Court held the ruling to be erroneous. "Such is not the law," say the court; "but the party thus assaulted may strike, or use a sufficient degree of force to prevent the intended blow, without retreating at all." The case is exactly in point. The exception is therefore sustained, and the cause will be remitted for a new trial.

*Exceptions sustained.*⁵

THE STATE v. J. R. BRYSON.

IN THE SUPREME COURT, NORTH CAROLINA, DECEMBER, 1864.

[*Reported in Winston, Law (No. 2), 86.*]

THIS was an indictment for an assault and battery by the defendant on L. S. Gash, tried before Reade, J., at Fall Term, 1864, of Henderson Superior Court.

The defendant's counsel asked the court to charge the jury, that if defendant, at the time he struck Gash, believed that Gash was about to strike him with the knife, that then the defendant had a right to strike him first.⁶ The court declined so to charge, but instructed the jury, that if defendant struck Gash, he was guilty, unless he struck in self-

¹ 58 Pa. St. 1, 21, 22.

² 57 Ind. 80.

³ 29 Ohio St. 186.

⁴ 3 Minn. 270.

⁵ *Beard v. U. S.*, 158 U. S. 550; *People v. Lewis*, 117 Cal. 186; *Heady v. Wood*, 6 Ind. 82; *Page v. State*, 141 Ind. 236; *State v. Goehring*, 106 Iowa, 636; *Thornton v. Taylor*, 19 Ky. L. Rep. 390; *Gallagher v. State*, 3 Minn. 270; *Commonwealth v. Drum*, 58 Pa. 1, 22; *Steph. Dig. Crim. Law* (3d ed.), 137, n. 1 *Accord*.

Compare *Howland v. Day*, 56 Vt. 318. — Ed.

⁶ Only so much of the case as relates to this request is given. — Ed.

defence: that if the jury believed that the defendant had good reason to believe, and did believe, that Gash was about to strike him, that then the defendant had the right to strike him first, unless the jury believed that the defendant sought the fight, or provoked Gash to attack him; in which case, the defendant would be guilty.

Verdict—guilty, and judgment accordingly from which defendant appealed.

Attorney General for the State.

W. H. Bailey for the defendant.

MANLY, J. The instructions asked for were properly refused. The court was requested to charge the jury that “if defendant, at the time he struck Gash, believed Gash was about to strike him with the knife, that then the defendant had the right to strike Gash first.”

A right to act in self-defence does not depend upon the special state of mind of the subject of inquiry. He is judged by the rules which are applicable to men whose nerves are in an ordinarily sound and healthy state; and whatever may be his personal apprehensions, if he has not reasonable ground to support them, he will not be protected by the principle of self-defence.

The normal condition of the human passions and faculties must be regarded in establishing rules for the government of human conduct. The question, then, in such cases as the present, is not what were the apprehensions of the defendant, but what these ought to have been, when measured by a standard derived from observation of men of ordinary firmness and reflection. This is what is called reasonable ground of belief, and is the rule for judging of a case of self-defence, upon an indictment for an assault and battery. Therefore a prayer for instruction, which assumed that one's personal feelings and apprehensions, however eccentric and morbid these might be, determined the character of his conduct, was properly refused.¹

JAMES RIPPY v. THE STATE.

IN THE SUPREME COURT, TENNESSEE, DECEMBER TERM, 1858.

[*Reported in 2 Head, 217.*]

CARUTHERS, J., delivered the opinion of the court.²

James Rippy was indicted in the Circuit Court of Bedford County for the murder of Houston Porter, and convicted of murder in the second degree, and sentenced to twenty-one years' confinement in the penitentiary.

The verdict is well sustained by the testimony. The defence, it seems, was rested upon the existence or apprehension of danger to

¹ Schmid v. Indiana Assn. (Ind. Ap. 1908), 85 N. E. 1032; Germolus v. Sausser, 83 Minn. 141; Beck v. Minneapolis Co., 95 Minn. 73; Higgins v. Minaghan, 78 Wis. 602 Accord. — ED.

² Only the opinion of the court is given. — ED.

himself at the time of the homicide. It is now insisted there is error in the charge on that doctrine. The objection is confined to this clause.

“It is argued the deceased made violent threats against the life of defendant long before, and up to a short period of the killing, and that these threats coming to the knowledge of defendant, he had a right to kill the deceased on sight. Such is not the opinion of the court; but to excuse the defendant, and therefore acquit him, the evidence ought to be such as to have reasonably satisfied the defendant that the deceased, at the time of the killing, was doing some overt act, or making some demonstration, showing a present intention to carry such threats into execution, otherwise it would not excuse him.”

The law, as thus laid down by the court, is substantially correct. The doctrine of the Grainger case, as explained by that of Copeland, is undoubtedly the law. Yet no case has been more perverted and misapplied by advocates and juries. We have had one case before us in the last few years, in which the broad proposition stated in the first of the above extract was charged as law. But for this, and the indications that it has obtained to some limited extent in the legal profession, it would scarcely be deemed necessary to notice it. There is no authority for such a position. It would be monstrous. No court should for a moment entertain or countenance it. The criminal code of no country ever has, nor, as we presume, ever will, give place to so bloody a principle.

The law on this subject is, that, to excuse a homicide, the danger of life, or great bodily injury, must either be real or honestly believed to be so at the time, and upon sufficient grounds. It must be *apparent* and *imminent*. Previous threats, or even acts of hostility, how violent soever, will not of themselves excuse the slayer, but there must be some words or overt acts at the time clearly indicative of a *present* purpose to do the injury. Past threats and hostile actions, or antecedent circumstances, can only be looked to in connection with present demonstrations as grounds of apprehension. To constitute the defence, the *belief* or apprehension of danger must be founded on sufficient circumstances to authorize the opinion that the deadly purpose then exists, and the *fear* that it will *at that time* be executed. The character of the deceased for violence, as well as his animosity to the defendant, as indicated by words and actions then and before, are proper matters for the consideration of the jury on the question of reasonable apprehension. Even if sufficient cause to fear does exist, but the deed is not perpetrated under the apprehension it is calculated to inspire, or the fear is feigned or pretended, the defence will not be available. So a case must not only be made out to authorize the fear of death or great harm, but such fear must be really entertained, and the act done under an honest and well-founded belief that it is absolutely necessary to kill at that moment, to save himself from a like injury. It is scarcely necessary to remark that a real or apparent

necessity, brought about by the design, contrivance, or fault of the defendant, is no excuse.

If any less injury than death or great bodily harm is feared or indicated by the circumstances, the plea of *self-defence* will not be sustained, but the degree of the crime may be reduced.

According to these principles, the guilt of the defendant was clearly made out — there was no error in the charge, and the judgment will be affirmed.¹

COCKCROFT v. SMITH.

IN THE QUEEN'S BENCH, EASTER TERM, 1705.

[Reported in 2 Salkeld, 642.]

IN trespass for an assault, battery, and maihem, defendant pleaded *son assault demesne*, which was admitted to be a good plea in maihem. But the question was, What assault was sufficient to maintain such a plea in maihem? HOLT, C. J., said that Wadham Wyndham, J., would not allow it if it was an unequal return; but the practice had been otherwise, and was fit to be settled: that for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defence: that if A. strike B., and B. strikes again, and they close immediately, and in the scuffle B. maihems A., that is *son assault*; but if upon a little blow given by A. to B., B. gives him a blow that maihems him, that is not *son assault demesne*. POWELL, J., agreed; for the reason why *son assault* is a good plea in maihem, is because it might be such an assault as endangered the defendant's life.

ROWE v. HAWKINS.

AT NISI PRIUS, CORAM CROWDER, J., 1858.

[Reported in 1 Foster & Finlason, 91.]

THE defendant was riding his horse in a street in Bristol, when the plaintiff ran from the pavement and seized the bridle. The defendant told him to "loose hold," and, on his not doing so, struck him on the head and face with his riding-whip, bringing blood. The plaintiff still retained his hold.

CROWDER, J. (to the jury). The defendant, after desiring the plaintiff to desist, was justified in endeavoring to obtain his release, using no more violence than was necessary for that purpose; and the

¹ See to the same effect, *Shorter v. People*, 2 N. Y. 193, 197-201. — ED.

most natural way of doing so was by striking at the person detaining him. That he used no more violence than was necessary for the purpose of extricating himself appears from the fact that, with all that he used, he did not succeed in doing so. *Verdict for the defendant.*

OGDEN v. CLAYCOMB.

SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1869.

[Reported in 52 Illinois Reports, 365.]

Mr. Justice LAWRENCE delivered the opinion of the court.

This was an action for assault and battery, in which the jury found for the defendant. The verdict was against the evidence, and there was error in the instructions for the defendant. From the first instruction the jury would understand, if the plaintiff advanced upon the defendant in a threatening manner for the purpose of fighting, and a fight followed, the plaintiff could not recover, even though the defendant had far exceeded the just bounds of self-defence and inflicted an inhuman beating, provided he desisted as soon as the plaintiff asked him to do so. The rule is, on the contrary, that no more violence can be used than a reasonable man would, under the circumstances, regard necessary to his defence. If he strikes a blow not necessary to his defence, or after all danger is past, or by way of revenge, he is guilty of an assault and battery. The third instruction tells the jury, among other things, that the plaintiff, in order to recover, should have been guilty of no provocation. This is error. It is wholly immaterial what language he may have used, so far as the right to maintain an action is concerned; and even if he went beyond words, and committed a technical assault, the acts of the defendant must still be limited to a reasonable self-defence. All the instructions for the defendant are pervaded to a greater or less degree by these errors, and should have been refused. The judgment must be reversed, and the cause remanded.

*Judgment reversed.*¹

¹ Hudson v. Crane, Noy, 115; Bridgman v. Skinner, 2 Barnard. 418; Thomason v. Gray, 82 Ala. 291; Watson v. Hastings, 1 Penn. (Del.) 47; Boren v. Bartleson, 39 Ill. 43; Jones v. Jones, 71 Ill. 562; Abt v. Burgheim, 80 Ill. 92; Philbrick v. Foster, 4 Ind. 442; Beavers v. Bowen, 26 Ky. L. Rep. 291, 80 S. W. R. 1165 s. c.; Rogers v. Waite, 44 Mo. 275; Hanson v. R. R. Co., 62 Mo. 84; Brown v. Gordon, 1 Gray, 182; Tyson v. Booth, 100 Mass. 262; O'Leary v. Rowan, 31 Mo. 117; Glassey v. Dye (Neb. 1909), 119 N. W. R. 1128; Scribner v. Beach, 4 Den. 448; Keyes v. Devlin, 3 E. D. Smith, 518; Edwards v. Leavitt, 46 Vt. 126; Smith v. Wilcox, 47 Vt. 537; Howland v. Day, 56 Vt. 318; Simpkins v. Eddie, 56 Vt. 612; Hallowell v. Niver (Court of Session, 1848), 5 D. 759. Accord.

It has been held that one may not exercise the ordinary right of self-defence in a church. Frances v. Ley, Cro. Jac. 366; Day v. Beddingfield, Noy. 104; Cockruff v. Cockruff, Comb. 17. — Ed.

DOLE v. ERSKINE.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JULY, 1857.

[Reported in 35 *New Hampshire Reports*, 503.]

TRESPASS, for assault and battery, alleged to have been committed by the defendant upon the plaintiff, at Claremont, in said county, on the 13th of November, 1854. The defendant pleaded that although he did assault the plaintiff, as alleged in the declaration, yet the plaintiff, in defending himself against such assault, used unnecessary and excessive force, then and there beating, bruising, and wounding said defendant in a grievous and shocking manner, wholly unjustifiable by law.

The commissioner to whom the case was referred reported that the averments of the plea were true. The court was to pass upon its validity in law.¹

EASTMAN, J. The only reported decision that we have been able to find, where the question presented was the same as that raised in the case before us, is that of *Elliott v. Brown*.² In that case it was held that the party first attacked, in a personal rencontre between two individuals, is not entitled to maintain an action for an assault and battery, if he uses so much personal violence towards the other party, exceeding the bounds of self-defence, as could not be justified under the plea of *son assault demesne*, were he a party defendant in a suit.

If the rule laid down in that case is sound law, this suit cannot be sustained, for the commissioner to whom the action was referred has reported, that, although the defendant committed the first assault, yet the plaintiff used more force than was necessary or justifiable in repelling that assault.

The ground upon which the decision in *Elliott v. Brown* was placed is, that there cannot be a recovery in cross actions for the same affray, but that the party who first recovers may plead that recovery in a suit against himself. No authority is cited to sustain that position, and it appears to us that it is not well founded.

If an assault is made upon a party, it may be repelled by force sufficient for self-defence, even to the use of violence; and if no more force is used than what is necessary to repel the attack, the party assaulted may, under the plea of *son assault demesne*, show the facts and have judgment. To this extent the law is well settled.³ If the affray stops there, the party first assailed, being justified in what he has done in self-defence, may have his action for the injury that he has received. He

¹ The statement of the case has been abridged, and the arguments of counsel are omitted. — Ed.

² 2 Wendell, 499.

³ 2 Greenl. Ev., sec. 95, and authorities cited.

has himself done nothing more than what the law permits; but the other party, in commencing and following up the assault, is liable not only for a breach of the peace, but for all the personal injuries that he has inflicted.

But if the person assaulted uses excessive force, beyond what is necessary for self-defence, he is liable for the excess, and the facts may be shown under the replication of *de injuria*. *Curtis v. Carson*; ¹ *Hannen v. Edes*; ² *Cockcroft v. Smith*.³

Up to the time that the excess is used, the party assaulted is in the right. Until he exceeds the bounds of self-defence he has committed no breach of the peace, and done no act for which he is liable; while his assailant, up to that time, is in the wrong, and is liable for his illegal acts. Now, can this cause of action which the assailed party has for the injury inflicted upon him, and which may have been severe, be lost by acts of violence subsequently committed by himself? Can the assault and battery, which the assailant himself has committed, be merged in or set off against the excessive force used by the assailed party? Unless this be so, and the party first commencing the assault and inflicting the blows, and thus giving to the other side a cause of action, can have the wrong thus done and the cause of action thus given, wiped out by the excessive castigation which he receives from the other party, then each party may sustain an action: the one that is assailed, for the assault and battery first committed upon him; and the assailant, for the excess of force used upon him beyond what was necessary for self-defence.

We think that these are not matters of set-off; that the one cannot be merged in the other; and that each party has been guilty of a wrong for which he has made himself liable to the other. There have, in effect, been two trespasses committed: the one by the assailant in commencing the assault, and the other by the assailed party in using the excessive force; and, upon principle, we do not see why the one can be an answer to the other, any more than an assault committed by one party on one day can be set off against one committed by the other party on another day. The only difference would seem to consist in the length of time that has elapsed between the two trespasses. In a case where excessive force is used, the party using it is innocent up to the time that he exceeds the bounds of self-defence. When he uses the excessive force, he then for the first time becomes a trespasser. And wherein consists the difference, except it be that of time, between a trespass committed by him then, and one committed by him on the same person the day after?

In *Elliott v. Brown*, it is conceded that both parties may be indicted and both be criminally punished, notwithstanding it was there held that a civil action can be maintained only against him who has been guilty of the excess. If this be so, and each party can be criminally punished,

¹ 2 N. H. 539.

² 15 Mass. 349.

³ Bul. *Nisi Prius*, 18.

then each must have been guilty of an assault and battery upon the other; and if thus guilty, why should not a civil action be maintained by each? It would seem that the fact that both are indictable shows that each is in the wrong as to the other, and that each has a cause of action against the other, and that such cause of action may be successfully prosecuted, unless one is to be set off against the other. That torts are not the subjects of set-off is entirely clear.

We arrive, then, at the conclusion that the causes of action existing in such cases cannot be set off, the one against the other, nor merged, the one in the other, but that each party may maintain an action for the injury received: the assailed party, for the assault first committed upon him; and the assailant for the excess above what was necessary for self-defence.

This rule, it appears to us, will do more justice to the parties and more credit to the law than the other, for by it the party who has commenced the assault, and who has been the moving cause of the difficulty, is made to answer in money, instead of having his assault merged in the one which he has provoked, and which has been inflicted upon him by his antagonist.

We think, also, that the view of the case which we have taken derives much strength from the fact that no precedent can be found of any pleading sustaining the defendant's views. It is remarkable that such a plea cannot be found in any of the books, if the defence has ever been regarded by the courts as good law.

Our opinion therefore is, that, upon the facts stated, the plaintiff would be entitled to judgment.¹

¹ *Thomason v. Gray*, 82 Ala. 291; *McNatt v. McRae*, 117 Ga. 898; *Adams v. Waggoner*, 33 Ind. 531, 533 (*semble*); *Stone v. Stone*, 2 Met. (Ky.) 339; *Grotton v. Glidden*, 84 Me. 589, 591; *Darling v. Wilkins*, 35 Oh. St. 58, 63; *Barholt v. Smith*, 45 Oh. St. 177 (*semble*); *Cade v. McFarland*, 48 Vt. 47; *Shay v. Thompson*, 59 Wis. 540; *Gutzman v. Clancy*, 114 Wis. 539 *Accord*.

But in *Elliott v. Brown*, 2 Wend. 497; *Chambers v. Porter*, 5 Coldw. 273 (*semble*), it was decided that one who in repelling an attack used excessive force thereby forfeited his right of action against the aggressor. — ED.

KECK v. HALSTEAD.

IN THE KING'S BENCH, TRINITY TERM, 1699.

[Reported in 3 Lutwyche, 481.]

TRESPASS for killing his mastiff.

The defendant pleads that it was a fierce dog, and did often bite men and cattle, of which the defendant had notice; that the dog came into the defendant's yard against his will; so that he was afraid to go out of his house, of which the plaintiff had notice; and the defendant desired him to keep his dog out of the yard, which he refusing or neglecting, the defendant shot the dog in his own yard, and traversed that he was guilty *extra atrium suum*.

The plaintiff replied *de injuria sua propria*, upon which they were at issue, and a verdict for the defendant; and by the opinion of the whole court the plea was held good.

The Serjeant doth not show that there was any objection made to the plea, why it should not be good, neither doth he give any reason for the judgment, and so there was no occasion of citing any book.¹

MORRIS v. NUGENT.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., JULY 27, 1836.

[Reported in 7 Carrington & Payne, 572.]

TRESPASS for shooting the plaintiff's dog. Plea: that the said dog was of a mischievous disposition, and unfit to be at large, whereof the plaintiff had notice; that the dog attacked the defendant, and would have bitten him had he not defended himself, wherefore, in self-defence, and to protect himself from being bitten, he killed him. Replication: *de injuria*. On the part of the defendant evidence was tendered to show that the dog was of a mischievous disposition, and had bitten others.

J. Evans objected that such evidence was inadmissible, as being irrelevant to the issue.

LORD DENMAN, C. J. I think it was unnecessary to state in the plea either that the dog was of a mischievous disposition, or that the plaintiff knew it; for the fact of the dog having attacked the defendant would be a sufficient justification for shooting him in self-defence, whether the dog was of a mischievous disposition or not; but you ought to have demurred to the plea for setting out irrelevant facts;

¹ Reynolds v. Phillips, 13 Ill. Ap. 557; Credit v. Brown, 10 Johns. 365 Accord. See Smith v. Griswold, 15 Hun, 273. — Ed.

having taken issue upon the plea, I cannot say that the evidence is immaterial.

It appeared that, as the defendant was passing the plaintiff's house, the dog ran out and bit the defendant's gaiter, and that, on the defendant turning round and raising a gun, which he had in his hand, the dog ran away, and that, as he was running away, and before he had got more than five yards off, the defendant shot and killed him.

J. Evans contended that the above evidence did not support the plea; that it ought to have been proved that at the time the defendant shot the dog he was in the act of attacking him; whereas here it appeared that he was running away; and he cited *Vere v. Lord Cawdor*, and *Wright v. Ramscott*.

LORD DENMAN, C. J. I think that the plea has not been proved, and the only question therefore for the jury will be one of damages. The circumstance of a dog being of a ferocious disposition, and being at large, is not sufficient to justify shooting him; to justify such a course, the animal must be actually attacking the party at the time.

Verdict for the plaintiff. Damages, 1s.¹

— v. FAKENHAM.

IN THE COMMON PLEAS, HILARY TERM, 1470.

[*Reported in Year-Book, 9 Edward IV., folio 48, placitum 4.*]

In trespass for battery against Fakenham, he says that the plaintiff made an assault upon one W. F., son of the said defendant, and the defendant saw this and commanded one J., his servant, to go to his son and defend him, and keep him from damage, by force of which he went to him and assaulted the said son [plaintiff?], and so the wrong which the plaintiff had was of the assault which he made upon the said W. F., and in defence of him, &c. *Catesby*. This is not to the purpose; for where a man assaults me, if I beat him in my defence, I shall be excused; but if he assaults a stranger, I cannot beat him in his defence, for I have nothing to do with him, but I can part them, &c. *MOYLE*, and *NEEDHAM, JJ.* If I see a man assaulting another, I can part them and put my hand upon him who made the assault, and hold him so that he cannot come at the other, &c.; but they said that I cannot draw my sword and beat the one who made the assault, &c.; but it is otherwise if one assaults my master, I can beat him in defence of my master,² &c. *CHOKE, J.* That is true, for the servant is held and bound to

¹ *Uhlein v. Cromack*, 109 Mass. 273; *Perry v. Phipps*, 10 Ired. 259 *Accord*.

But see *Bowers v. Fitzrandolph*, Addis. 215. — Ed.

² Y. B. 14 Hen. VI., fol. 24, pl. 72; Y. B. 35 Hen. VI., fol. 66, pl. 5; *Barfoot v. Reynolds*, 2 Stra. 593 *Accord*. — Ed.

the master, and so he can for his mistress, &c. But the master cannot do as much for his servant, for he is not so held to do for his servant, &c. And then *Genney* says *ut supra* that the plaintiff assaulted the said son of the defendant then being present, &c., and he commanded such an one, his servant, to go to his son and part them, and keep his son without damage, by reason whereof he went to them and parted them, and put his hand upon this plaintiff, so that he should not approach the said son, &c., which is the same battery, &c.

SEAMAN v. CUPPLEDICK.

IN THE KING'S BENCH, BETWEEN 1607 AND 1612.

[*Reported in Owen, 150.*]

In a trespass of assault and battery, the defendant justified in defence of his servant, *scil.* that the plaintiff had assaulted his servant, and would have beaten him, &c., and the plaintiff demurred.

YELVERTON, J. The bar is good, for the master may defend his servant, or otherwise he may lose his service. 19 Hen. VI. 60 *a*.

CROOK, J. The lord may justify in defence of his villein, for he is his inheritance.

Williams, contra. The master cannot justify, but the servant may justify in defence of his master, for he owes duty to his master. 9 Edw. IV. 48.

YELVERTON, J. The master may maintain a plea personal for his servant, 21 Hen. VII., and shall have an action for beating his servant; and also a man may justify in defence of his cattle.

Cook. A man may use force in defence of his goods, if another will take them: and so if a man will strike your cattle, you may justify in defence of them; and so a man may defend his son or servant, but he cannot break the peace for them; but if another does assault the servant, the master may defend him and strike the other if he will not let him alone.

Williams. It hath been adjudged in *Banham's case* that a man cannot justify a battery in defence of his soil: *a fortiori*, he cannot in defence of his servant. *Vide* 19 Hen. VI. 31; 9 Edw. IV. 48.

LEWARD v. BASELY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1695.

[Reported in 1 Lord Raymond, 62.]

TRESPASS, assault, and battery, for a battery committed upon the wife. The defendant pleads *de son assault demesne* of the wife. The plaintiffs reply, that the defendant went out to fight the husband, and that she, being desirous to assist her husband, and to keep him from being wounded, *insultum fecit* upon the defendant. The defendant demurs. And Mr. Carthew argued that this *insultum fecit* was ill. And for that he cited a case between Jones and Tresilian.¹ Trespass, assault, and battery; the defendant pleaded *de son assault demesne*; the plaintiff replied, that he was possessed of a close called Cupner's close, and that the defendant broke the gate and chased his horses in the close, and the plaintiff for defending his possession *molliter insultum fecit* upon the defendant: and upon demurrer adjudged a bad replication, for he should have said *molliter manus imposuit*; but he could not justify an assault in defence of his possession. And this case the court agreed to be good law, but different from the present case; for this is a justifiable assault, for the wife may lawfully make an assault, to keep her husband from harm, and she has pleaded it so. In the same manner a servant may justify an assault in defence of his master, not *e contra*, because the master might have an action *per quod servitium amisit*. So in this case, if the defendant lifted his hand to strike the husband, the wife might well justify an assault to prevent the blow. And if the fact had been otherwise, the defendant ought to have rejoined *de son tort demesne*, and then it had been against the plaintiff. But a man cannot justify an assault in defence of his horse, or his possession, for there he ought to say *molliter manus imposuit*.

*Judgment for the plaintiff, nisi, &c.*⁵

¹ 1 Lev. 282.

A parent may defend his or her child. *Hill v. Rogers*, 2 Iowa, 67; *Commonwealth v. Malone*, 114 Mass. 295. A child may defend his or her parent. *Greis' Case*, Clayt. 120, pl. 211; *Obier v. Neal*, 1 Houst. 449; *Beavers v. Bowen*, 26 Ky. L. Rep. 291, 80 S. W. R. 1165 s. c.; *Drinkhorn v. Bubel*, 85 Mich. 532; *State v. Johnson*, 75 N. Ca. 174; *Pinson v. State*, 23 Tex. 579, 583; *Waddell v. State*, 1 Tex. Ap. 720. A husband may defend his wife. *Tompkins v. Knut*, 94 Fed. R. 956. — ED.

SECTION VI. (*continued*).

(d) DEFENCE OF PROPERTY.

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1440.

[Reported in Year-Book, 19 Henry VI., folio 31, placitum 59.]

A WRIT of trespass was brought by A. against another. And counted by *Fortescue* how the defendant with force him assaulted, wounded, and ill-treated. *Markham*. You ought not to have an action, for we say that the plaintiff, in the same place where he supposes the trespass, came and took certain goods of the defendant, viz., &c., and the defendant bade him leave the goods, and the plaintiff would not, whereupon he took them out of his possession, as he lawfully might, and the wrong which he had was in defence of our goods, and we do not at all understand that for this he ought to maintain an action. *Fortescue*. You see well that this plea amounts to nothing more than *son assault demesne*, wherefore we pray to be discharged of the rest. And, sir, as it seems to me, we shall recover our damages by his own confession; for he had a sufficient remedy at common law, *scilicet* he had an action of trespass *de bonis asportatis*, and he would have recovered against the plaintiff for this cause. For, suppose that you make an assault upon me, I am bound to go from you as fast as I can, and not now to beat you. And this is well proved by the plea in bar; for it is that the wrong which he had was from his own assault, and in defence of the defendant; so this case proves well that it is not lawful for any one to beat another; and this case is stronger than the other. Wherefore — *PASTON, J.* The whole plea *ut supra* shall be entered on the roll; for it does not appear to be a plea of assault merely, as you allege, and it will be mischievous to the defendant to have so general a plea as you would claim, and it will be more reasonable to allege the whole matter *ut supra*, so that the jurors shall have knowledge of the whole matter, than to rule the defendant to so general a plea; for it does not lie in the knowledge of the jurors whether this was merely an assault or not. And suppose that a man was about to carry off your wife, would you not beat him? (*Q. d. sic.*) And notwithstanding that you beat him in defence of your wife, you shall be excused in law; for it is in defence of your chattel; and all this matter shall be entered on the roll *ut supra*, wherefore it seems to me to have been well pleaded. *NEWTON, C. J.*, to the same intent. For, if a man will take my horse from me, or anything which belongs to me, and I will not suffer him to do it, although he is hurt, in this

case I shall be excused in law.¹ And suppose that a man is about to beat my servant, and I aid my servant in his defence, although the other is hurt by me, all this matter shall be adjudged in defence of my servant, and of my goods. For, since he was about to injure me, this malfeasance shall be said to be an assault upon me begun by him, and all this shall be said to be in defence of the goods and chattels of the defendant. Wherefore, &c. And so was the opinion of Ayscoghe, Fulthorpe, JJ., and all the court. *Quod nota.*

ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1470.

[Reported in Year-Book, 9 Edward IV., folio 28, placitum 42.]

IN TRESPASS for a battery the defendant showed how the plaintiff would have taken away 6d. of the moneys of the defendant, and that he put his hands upon him, and would not allow him. And it was held by the Justices that if a man will take my goods, I may lay my hand upon him and prevent him; and if he will not desist, I may beat him, rather than let him carry them off.

GREEN v. GODDARD.

IN THE QUEEN'S BENCH, BETWEEN 1703 AND 1705.

[Reported in 2 Salkeld, 641.]

TRESPASS, assault, and battery, laid on the 1st of October, 3 Reg. The defendant, as to the *vi et armis*, pleaded *non cul.* And as to the residue, says, that long before, viz., on the 13th of September, a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, *et manu forti impedivit ipsum ac taurum præd. rescussisse voluit, et quod ad præveniend. etc., ipse idem defend. parvum flagellum super querentem molliter imposuit, quod est idem residuum, etc., absque hoc quod cul. fuit ad aliquod tempus ante eundem 13 diem.* The plaintiff demurred. Mr. Eyre, for the plaintiff, argued that they should have requested him to go out of the close. 19 Hen. VI. 31; 11 Hen. VI. 23; 2 Ro. Tresp. 547, 548, 549.

¹ Y. B. 19 Hen. VI., fol. 66, pl. 5; Taylor v. Markham, Cro. Jac. 224, Yel. 157, Brownl. 215 a. c.; Alderson v. Waistell, 1 C. & K. 358; Motes v. Berry, 74 Ala. 374; Commonwealth v. Kennard, 8 Pick. 133; Stuyvesant v. Wilcox (Mich. 1892), 52 N. W. R. 465; Bliss v. Johnson, 78 N. Y. 529 Accord. — Ed.

Et per Curiam. There is a force in law, as in every trespass *quare clausum fregit*: As if one enters into my ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close, in law, without a request. The other is an actual force, as in burglary, as breaking open a door or gate; and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to be gone, but may lay hands on him immediately, for it is but returning violence with violence; so, if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request.¹

COLLINS v. RENISON.

IN THE KING'S BENCH, TRINITY TERM, 1754.

[Reported in *Sayer*, 138.]

IN the declaration, in an action of trespass, it was alleged that the defendant overturned a ladder upon which the plaintiff was standing, and threw the plaintiff from it upon the ground.

The defendant pleaded that he was in possession of a certain garden, and that the plaintiff, against the will of the defendant, erected a ladder in the garden, and went up the ladder, in order to nail a board to the house of the plaintiff; that the defendant forbade the plaintiff so to do, and desired him to come down; and that, upon the plaintiff's persisting in nailing the board, he gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground, thereby doing as little damage as possible to the plaintiff.

Upon a demurrer to this plea, it was holden to be bad,

And by RYDER, C. J. Such force as was used in the present case is not justifiable in defence of the possession of land.¹ The overturning of the ladder could not answer the purpose of removing the plaintiff out of the garden, since it only left him upon the ground at the bottom of the ladder, instead of being upon it.

And by DENISON, J. As only the ladder was in the present case *damage feasant*, it was no more lawful to throw this down whilst the plaintiff was upon it than it is to distrain a horse *damage feasant* whilst a man is upon the horse's back, which it is not lawful to do.

¹ A portion of the case is omitted. — Ed.

² *Cole v. Maunder*, 2 Rolle Ab. 548; *Simpson v. Morris*, 4 Taunt. 821; *Newcome v. Russell* (Ky. 1909), 117 S. W. R. 306; *Everton v. Ergati*, 24 Neb. 235; *Hunt v. Caskey* (N. J. 1906), 60 Atl. R. 46; *State v. Lazarus*, 1 Mill, Const. R. 33 *Accord.* — Ed.

TULLAY v. REED.

AT NISI PRIUS, CORAM PARK, J., NOVEMBER 29, 1823.

[Reported in 1 Carrington & Payne, 6.]

THIS was an action for assaulting and beating the plaintiff, in which the defendant pleaded the general issue; and a special plea of *molliter manus imposuit*.

Evidence was given of the assault on the part of the plaintiff, and evidence in support of the special plea was given on the part of the defendant.

PARK, J., laid it down as clear law that if a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary), without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without a previous request to depart.

*Verdict for the defendant.*¹

COMMONWEALTH v. CLARK.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1840.

[Reported in 2 Metcalf, 23.]

ON the trial of the defendant, in the Court of Common Pleas, before *Strong, J.*, for an assault and battery on Lemuel Briggs, it was proved that the defendant, with another man, entered Briggs's close, and was using his grindstone, when Briggs went to them, and repeatedly ordered the defendant to go from his premises, and the defendant repeatedly told him he would not go, but would remain there as long as he pleased. Immediately after this, according to the testimony of one witness, Briggs "put the flat of his hand on both cheeks of the defendant's face."

¹ *Jelly v. Bradley*, Car. & M. 270; *Thomas v. Marsh*, 5 C. & P. 596; *Moriarty v. Brooks*, 6 C. & P. 684; *Polkinhorn v. Wright*, 8 Q. B. 197; *Holmes v. Bagge*, 1 E. & B. 782; *Jackson v. Courtenay*, 8 E. & B. 8; *Lowe v. Telford*, 1 App. Cas. 414; *Scott v. Brown*, 51 L. T. Rep. 746; *Thompson v. Berry*, 1 Cranch C. C. 45; *Riddle v. Brown*, 20 Ala. 412; *McCarthy v. Fremont*, 23 Cal. 196; *Peck v. Smith*, 41 Conn. 442; *McDermott v. Kennedy*, 1 Harr. (Del.) 143; *State v. Lockwood*, 1 Penn. (Del.) 76; *Woodman v. Howell*, 45 Ill. 367; *R. R. Co. v. Peacock*, 48 Ill. 253; *Smith v. Slocum*, 62 Ill. 354; *Coleman v. R. R. Co.*, 106 Mass. 160; *Drew v. Comstock*, 57 Mich. 176; *Breitenbach v. Trowbridge*, 84 Mich. 393; *Gillespie v. Beecher*, 85 Mich. 347; *Sandford v. —*, 23 N. Y. 343; *Howe v. Oldham*, 23 N. Y. 700; *Wall v. Lee*, 34 N. Y. 141; *Sage v. Harpending*, 49 Barb. 166; *Lichtenwellner v. Laubach*, 105 Pa. 366; *Watrous v. Steel*, 4 Vt. 629; *Harrison v. Harrison*, 43 Vt. 417 *Accord*.

One having a right of way may use reasonable force in removing a person who obstructs the way. *Williams v. Lubbering*, 73 N. J. 317.

In *Redfield v. Redfield*, 75 Iowa, 435, the plaintiff and her husband were living with the

Another witness testified that "Briggs brushed the defendant's cheek;" and it was testified by a third witness, that Briggs "struck the defendant on the side of his face twice with the flat of his hand," and that "blood was drawn thereby, probably produced by the nails of the hand."

The court instructed the jury that Briggs had a right, after requesting the defendant to remove from his premises, and his refusal, to use proper and reasonable force to remove him; that the jury must determine, from the testimony, what the transaction was; how much and what kind of force Briggs used; and if, in their opinion, he used more force than was necessary, or if the force was not appropriate and calculated to effect the object of removing him, then they should consider Briggs as having committed the first assault. But if they considered the force, which he used, as necessary and proper, and also appropriate and calculated to effect the object, then he would be justified in what he did, and would not have committed the first assault.

The jury found the defendant guilty, and the defendant alleged exceptions to these instructions of the court.

SHAW, C. J. It was contended in behalf of the defendant, that the complainant, Briggs, had no right by law to commit a battery on the defendant, in order to remove him from his premises. But the difficulty of maintaining this position in point of law is this: that every touching of another's person, wilfully or in anger, without his consent, is technically a battery, unless justifiable. But if justifiable, then it is not necessarily either a battle or an assault.¹ Whether the act, therefore, in particular case, is an assault and battery, or a gentle imposition of hands, or application of force, depends upon the question whether there was a justifiable cause. It would, therefore, be absurd to say it cannot be justifiable because it is a battery. But the true questions, we think, are, 1st, whether the party justifying had a good reason for using force; and if so, 2d, whether such force was appropriate in kind, and suitable in degree, to accomplish the purpose.

It is well settled that a person may, after requesting another to remove from his premises, and his refusal to do so, use force for the purpose of removing him.² *Weaver v. Bush*.³ As the kind and degree

defendant in the latter's house by his sufferance. The defendant was held liable for a battery committed in ejecting the plaintiff at an unreasonable hour of the night. An owner who gives the possession of his land to another cannot justify a battery upon a third person in an attempt to eject him from the land. *Cowperthwaite v. Brown*, (Neb. 1908) 117 N. W. R. 709. — Ed.

¹ 5 Dane Ab. 584.

² 8 T. R. 78.

³ Com. Dig. Pleader, 3 M. 16, 17.

of force, proper to remove a trespasser, must depend upon the conduct of the trespasser in each particular case, the question whether it was suitable and moderate in any particular case, is a question of fact to be left to the jury. In the present case, there was some contrariety in the statement of the several witnesses, who testified to the transaction. The court were requested to instruct the jury that if the act of Briggs was, in their opinion, a battery, it was not a proper kind of force to be used to remove the defendant from his premises, and so would be the first assault, and justify the defendant. But the court could not properly give this instruction; because, whether it was a battery or not, depended on the question whether it was suitable in kind and degree to accomplish his justifiable object. If it be said that a "battery," in this prayer for an instruction, was not used in its technical sense, but intended striking, or the violent infliction of blows, then the instruction was, in effect, given as prayed for, by the instruction that Briggs could justify no application of force which was not suitable, in kind and degree, to the occasion.

We are of opinion that the instructions were correct and were expressed with accuracy and caution, and with the necessary qualifications, and were conformable to the rules of law.¹

Exceptions overruled, and judgment on the verdict.

WADHURST v. DAMME.

IN THE KING'S BENCH, TRINITY TERM, 1604.

[*Reported in Croke's James, 45.*]

TRESPASS, for that at Etonbridge, in the county of Kent, he killed his dog, being a mastiff dog. The defendant pleads that Sir Francis Willoughby was seised in fee of a warren in D., within the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there; and therefore he finding him there *tempore quo*, &c., running at conies, he there killed him. And it was thereupon demurred.

But all the court held that the matter of justification is good; because it being alleged that the dog used to be there killing conies, it is good cause for the killing him, in salvation of his conies; for, having used to haunt the warren, he cannot otherwise be restrained.

YELVERTON doubted thereof, because it is not alleged that the master was *sciens* of that quality.

POPHAM. The common use of England is to kill dogs and cats in all warrens, as well as any vermin; which shows that the law

¹ *Ironmonger v. Holland*, Freem. 136; *Commw. v. Dougherty*, 107 Mass. 248; *Shriver v. Bean*, 112 Mich. 508; *State v. Howell*, 21 Mont. 165 *Accord.* — ED.

hath been always taken to be that they may well kill them: so the justification is good. Wherefore it accordingly was adjudged for the defendant.¹

JANSON v. BROWN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 8, 1807.

[Reported in 1 Campbell, 41.]

TRESPASS for shooting the plaintiff's dog. Pleas: first, not guilty; and, second, a justification that the dog was worrying and attempting to kill a fowl of the defendant's, and could not otherwise be prevented from so doing. Replication to the last plea: *de injuria sua propria absque tali causa*.

The case being made out on the part of the plaintiff, *Garrow*, for the defendant, said he should prove that just before the dog was shot, being accustomed to chase the defendant's poultry, he was worrying the fowl in question, and that he had not dropped it from his mouth above an instant when the piece was fired. But,

LORD ELLENBOROUGH said this would not make out the justification, to which it was necessary that, when the dog was shot, he should have been in the very act of killing the fowl, and could not be prevented from effecting his purpose by any other means.

*Verdict for plaintiff, with 1s. damages.*²

LEONARD v. WILKINS.

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1812.

[Reported in 9 Johnson, 233.]

IN error, on *certiorari*, from a justice's court. Leonard sued Wilkins, before the justice, for shooting the dog of the plaintiff. The defendant pleaded not guilty, and the cause was tried before a jury. It was proved that a dog of the pointer breed was possessed by the plaintiff, and that he had no other dog. The defendant said to one of the witnesses that he had shot the plaintiff's dog. Another witness saw the defendant shoot the dog, which was in the field of the defendant. The dog was running with a fowl in his mouth, and the defendant called after the dog before he fired; but he had the fowl in his

¹ See *Lewin's Case*, 2 Rolle, Ab. 567; *King v. Rose*, Freem. 347. — Ed.

² *Wright v. Ramscot*, 1 Saunders, 84; *Vere v. Cawdor*, 11 East, 568; *Wells v. Head*, 4 C. & P. 568; *Protheroe v. Matthews*, 5 C. & P. 581 *Accord*.

See *Barrington v. Turner*, 3 Lev. 28. — Ed.

mouth at the time he was shot. The plaintiff was near the place at the time, on horseback, but it did not appear that the defendant saw him, or knew that he was near, until after he shot the dog. Several witnesses testified that the same dog worried and injured their fowls and geese; and that there was an alarm in the neighborhood respecting mad dogs.

The jury found a verdict that the plaintiff had no cause of action, on which the justice gave judgment against the plaintiff for the costs.

Per Curiam. The verdict below was not against law. The dog was on the land of the defendant, in the act of destroying a fowl; and the defendant was justified in killing him, in like manner as if he was chasing and killing sheep, deer, calves, or other reclaimed and useful animals. This principle has been frequently and solemnly determined.¹ It was for the jury to determine whether the killing was justified by the necessity of the case, and as requisite to preserve the fowl; and the fowl being on the land of the defendant was enough, without showing property in the fowl.

*Judgment affirmed.*²

CLARK v. KELIHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1871.

[Reported in 107 *Massachusetts Reports*, 406.]

TORT, brought originally before a justice of the peace, who gave judgment for the plaintiff. The defendant appealed to the Superior Court, where the facts were agreed as follows: ³—

“The plaintiff kept a number of hens, and suffered them to go at large. The defendant occupied the adjoining lot. The plaintiff’s hens ran into the defendant’s grass and made nests therein, to some extent. A path was made in the grass. The defendant requested the plaintiff to shut up his hens, and threatened to kill them if they were not. The plaintiff neglected and declined to do so. The hens continued to go upon the defendant’s land, when the defendant openly, with a stick, killed the whole lot of hens, and put them down in the plaintiff’s doorway. The value of hens thus killed was five dollars.”

AMES, J. The act of killing the plaintiff’s hens was without legal justification. It is admitted that a landowner has no right to kill his

¹ Cro. Jac. 45; 3 Lev. 25.

² *Anderson v. Smith*, 7 Ill. Ap. 354; *Dumming v. Bird*, 24 Ill. Ap. 274; *Lipe v. Blackwelder*, 25 Ill. Ap. 119; *Marshall v. Blackshire*, 44 Iowa, 475; *Nesbett v. Wilbur*, 177 Mass. 200; *Throne v. Mead*, 122 Mich. 273; *McChesney v. Wilson*, 132 Mich. 252; *Canifax v. Crenshaw*, 24 Mo. 199; *Brown v. Hoburger*, 52 Barb. 15; *Boucher v. Lutz*, 13 Daly, 28; *Morse v. Nixon*, 8 Jones (N. Ca.), 35, 6 Jones (N. Ca.), 293; *Williams v. Dixon*, 65 N. Ca. 416; *King v. Kline*, 6 Pa. 318 *Accord.* — Ed.

³ A portion of the case not relating to justification is omitted. — Ed.

neighbor's cattle when found trespassing, but must content himself with his legal remedies of impounding or bringing a suit at law. The destruction of valuable property is not necessary to the protection of his rights: and this rule applies as well to feathered animals not *feræ naturæ*, as to larger and more valuable animals. Animals fully reclaimed and used for burden, husbandry, or food, are property of intrinsic value, and as such are under legal protection. *Blair v. Forehand*.¹ The notice given of his intention to kill them would be a mere threat to do an illegal act, and would not vary the case. It has been decided in Connecticut that the poisoning of a man's hens, after complaint of repeated trespasses, and warning of an intent to kill them, was a wrong for which an action would lie, and we concur with the reasoning of the court in that decision. *Johnson v. Patterson*.²

*Judgment for the plaintiff for \$5 and interest.*³

WILLIAM B. LIVERMORE v. DANIEL K. BATCHELDER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, FEB. 25, 1886.

[Reported in 141 *Massachusetts Reports*, 179.]

TORT for killing the plaintiff's dog. Trial in the Superior Court, without a jury, before Brigham, C. J., who found the following facts:

The plaintiff, on February 20, 1884, was the owner of a dog, which was duly licensed by the town of Reading, and wore a collar, duly marked as required by the Pub. Sts. c. 102, § 80.

On said February 20, the plaintiff's dog, with another dog, came upon the defendant's premises, and there killed and maimed hens of the defendant, which were in his hen-house or shed. The dogs were driven away, and, in about fifteen minutes afterwards, came again upon the defendant's premises, and were running towards the same shed and hen-house of the defendant, when the defendant, having reasonable cause to believe that the dogs were proceeding to maim and kill others of his hens in said shed and hen-house, shot and killed the plaintiff's dog.

¹ 100 Mass. 136, 140.

² 14 Conn. 1.

³ *Conner v. Champneys*, 2 Marsh. 584 (cited); *Brent v. Kimball*, 60 Ill. 211; *Ulery v. Jones*, 81 Ill. 403; *McClelland v. Kay*, 14 B. Mon. 103; *Ten Hopen v. Walker*, 96 Mich. 236; *Bowers v. Horen*, 93 Mich. 420; *McChesney v. Wilson*, 132 Mich. 252; *McIntyre v. Plaisted*, 57 N. H. 606; *Matthews v. Fiestel*, 2 E. D. Smith, 90; *Bowers v. Horan* (Mich. 1892), 53 N. W. R. 535; *Arthur v. Wells*, 2 Mill's C. R. (S. Ca.) 314; *Richardson v. Dukes*, 4 McCord, 156; *McCoy v. Phipps*, 4 Rich. (S. Ca.) 463; *Priester v. Angley*, 5 Rich. (S. Ca.) 44; *Hobson v. Perry*, 1 Hill (S. Ca.) 277; *Henderson v. Lyles*, 2 Hill (S. Ca.) 504; *Ford v. Taggart*, 4 Tex. 492; *Champion v. Vincent*, 20 Tex. 811 *Accord*. — ED.

Upon these facts, the judge ruled that the defendant's killing of the plaintiff's dog under the circumstances stated was not, in law, justifiable; and thereupon found and ordered judgment for the plaintiff. The defendant alleged exceptions.

HOLMES, J. The ruling of the court, as we understand it, meant that the facts found, without more, did not disclose a justification for killing the plaintiff's dog. It was found that the defendant had reasonable cause to believe that the dog was proceeding to maim and kill his hens, but not that he had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens. The justification, therefore, was not made out.¹ *Wright v. Ramscot*;² *Janson v. Brown*. See *Commonwealth v. Woodward*.³

It is unnecessary to consider whether the common law remedy is taken away by the Pub. Sts. c. 102, §§ 80-110.

Exceptions overruled.

ALDRICH v. WRIGHT.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, DECEMBER, 1879.

[Reported in 53 *New Hampshire Reports*, 398.]

DEBT, by Arthur R. Aldrich against Wells Wright, to recover the penalties prescribed by sec. 2, chap. 251, General Statutes, for killing minks. The defendant admitted the killing of four minks, but alleged, in justification, that the animals were at the time pursuing his geese.

The only evidence in the case was the testimony of George W. Blood, who, in common with the defendant, owned a small goose-pond. The dividing line between the premises of the witness and the defendant was the brook running into this pond; and the houses occupied by the witness and the defendant were on the opposite sides of the brook, and but a few rods distant therefrom. The witness testified as follows: "I stood in my dooryard; heard the geese cackling; I came out on to a little knoll; I saw the four minks swimming towards the geese; some of the geese had then got on to the shore of the pond and some of them were in the water; the minks were from one to three rods distant from the geese; some of the geese within a rod of the minks, who were one old mink and three young ones, but all about the same size. As soon as the minks saw me they stopped pursuing the geese, and ran out upon a little island, and there stopped. At the same time that I came out the defendant also came out with his gun; he came out

¹ *Brent v. Kimball*, 60 Ill. 211; *Spray v. Ammerman*, 66 Ill. 309; *Hinckley v. Emerson*, 4 Cow. 351 *Accord.* *Baret v. Utley*, 12 Bush, 399 (statutory); *Parrott v. Hartsfield*, 4 Dev. & B. 110 *Contra.* — Ed.

² 1 Saund. 84.

³ 102 Mass. 155, 161.

near the end of a causeway that is laid across the lower end of the pond, and fired at the minks on the island, killing them all at one shot; the minks were all on the island when he fired; the defendant carried the minks off to his house; the geese were six old ones, and eight young ones about half grown; geese had run in the pond two or three summers; never knew of any mink chasing any geese there before or since; don't know whether minks are accustomed to kill geese or not."

A verdict was taken for the plaintiff by consent, subject to the defendant's exception to a *pro forma* ruling that the defendant would not be justified in killing the minks if the geese were not in imminent danger, and could have been protected either by driving away the geese, or frightening or driving off the minks.

Ray, Drew and Heywood, for the defendant.

G. A. Bingham and Aldrich, for the plaintiff.

DOE, J. In this case the question is, not of the real danger merely, but also of the danger, on reasonable grounds, really believed by the defendant to exist.

The reputation of the minks, their pursuit of the geese, and the alarm and retreat of the latter, may have shown apparent danger, when the real character of the pursuers may have created no actual danger. Mr. Blood, a near neighbor of the defendant, did not know whether minks are accustomed to kill geese or not. The defendant may have been equally uninstructed. And it was not his duty to postpone the defence of his property until, neglecting his usual occupations and incurring expense, he could examine zoölogical authorities, consult experts, or take the opinion of the county, on the question whether his "half-grown" geese were actually endangered, in life or limb, by the incursion of "one old mink and three young ones," "all about the same size." The conclusion of the investigation might be too late. And if the question were found to be a debatable and doubtful one, it would not be his duty to settle it by a trial at his own risk. The plaintiff's doctrine destroys the right of defence which exists in a case of merely apparent danger.

The plaintiff's claim that the defendant is liable if the geese were not in imminent danger, taken in the sense for which the plaintiff contends, and the sense in which both parties, at the trial, probably understood it, cannot be sustained.

The term "imminent" does not describe the proximity of the danger by any rule of mechanical measurement; and, in its broad and popular signification, admitting a large degree of latitude and adaptation to circumstances, it may be properly used in this case. But it has been so much used in cases of defence against a human aggressor, and, in that class of cases, has, for peculiar reasons, acquired a legal meaning so special, restricted, and technical, that, if used in a case like the present, it should be accompanied by some explanation of the general comparative and relative sense in which it is used.

It is probable that the parties understood that, by the doctrine of imminent danger, the defendant was liable unless the geese would, in a few moments, have been killed by the minks but for the defendant's shot. The doctrine, asserted in that form, would be erroneous. It was for the jury to say, considering the defendant's valuable property in the geese, the absence of absolute property in the minks, their character, whether harmless or dangerous, the probability of their renewing their pursuit if he had gone about his usual business and left the geese to their fate, the sufficiency and practicability of other kinds of defence, — considering all the material elements of the question, it was for the jury to say whether the danger was so imminent as to make the defendant's shot reasonably necessary in point of time. If, but for the shot, some of the geese, continuing to resort as usual to the pond, apparently would have been killed by these minks within a period quite indefinite, and if other precautionary measures of a reasonable kind, as measured by consequences, would have been ineffectual, the danger was imminent enough to justify the destruction of the minks for the protection of property.

Neither was there a remedy in guarding the fowls day and night. The profit accruing from six old geese and eight young ones would not pay the expense of constant convoy. His property might as well be consumed by the minks as by the cost of a guard. But, however small the value of the property, he had a right to protect it by means reasonably necessary: reasonable necessity included a consideration of economy: and eternal vigilance, as the price of success in his limited anserine business, was not reasonable. According to the precedent of charging the watch to bid any one stand, and, if he will not stand, to let him go, the defendant should have been thankful if the minks, when challenged, had gone off; but their halt at the island showed no inclination to go any considerable distance. What practicable method was there of protecting the geese in the peaceful possession and enjoyment of the pond? Without a resort to firearms, his situation would seem to have been full of embarrassment. The invasion of his premises was annoying; the legal perplexities, with which it is now claimed he was environed, had they been understood by him at the time, would have been distressing.

If (as a jury would probably find the fact to be) it apparently was reasonably necessary for him to kill the minks in order to prevent their doing mischief to his property, the authorities do not show that he transcended the right of defence.

The claim that the defendant was liable if the geese could have been protected by driving them away from the minks, cannot be sustained.

Requiring the defendant to drive away the minks if he could, is an admission that he had a right to drive them away, and that they had no right to remain on his premises without his consent. But requiring him, if he could not drive them away from the geese, to drive the geese away from them, is a practical denial of his right to keep geese

in his own pond or on his own land, if he could only keep them there by killing minks. It amounts to this: it being impracticable to permanently eject the assailants, he must banish the assailed; and, the raising of geese being impossible, the raising of minks is compulsory. A freeholder, permitted to fire blank cartridges only to cover the endless retreat of his poultry before these marauders, and obliged to suffer such an enemy to ravage his lands and waters with boldness generated by impunity, is a result of turning the fact of the reasonable necessity of retreating to the wall before a human assailant into a universal rule of law. This rule practically compels the defendant to bring his poultry to the block prematurely, and to abandon an important branch of agricultural industry. His right of protecting his fowls is merely his right of exterminating them.

To hold, in this case, that the geese should have been driven away from their home, would be equivalent to holding that they should have been killed. The doctrine of retreat would leave them a right to nothing but life in some place inaccessible to minks, where life might be unremunerative and burdensome. But that doctrine being irrelevant when the aggressor is not shielded by the inviolability of the human form and the sacred quality of human life, the geese were not bound to retreat. As against the minks, they had a right, not only to live, but to live where the defendant chose, on his soil and pond, and to enjoy such food, drink, and sanitary privileges as they found there, unmolested by these vermin, in a state of tranquillity conducive to their profitable nurture. And it was for the jury to say, not whether he could have driven them away from the minks, but whether his shot was reasonably necessary for the protection of his property, considering what adequate and economical means of permanent protection were available, the legal valuation of vermin life, and the disturbance and mischief likely to be wrought upon his real and personal estate if any other than a sanguinary defence were adopted.

*Verdict set aside.*¹

ELISHA W. DAVIS v. CHARLES CAMPBELL.

IN THE SUPREME COURT, VERMONT, JANUARY TERM, 1851.

[Reported in 28 Vermont Reports, 236.]

TRESPASS for injury to the plaintiff's cow by means of a dog.

The referee reported substantially as follows: The plaintiff, at the time of the injury complained of, was the owner of a cow, which, with other cattle of the plaintiff, ran at large in the highway, and entered from the highway into the defendant's inclosure, adjoining the highway, and were there doing damage; and the defendant caused the cow to be driven from thence by means of a dog. The cow was pur-

¹ See Taylor v. Newman, 4 B. & S. 89, 91. — Ed.

sued by the dog eight or ten rods into the highway, and was greatly injured by being bitten by the dog. The dog was of a medium size, and was not of ferocious disposition, and was such a dog as a prudent farmer might and would use in driving his own cattle from his inclosure; and the defendant and his servants, in driving the plaintiff's cow from the inclosure by means of the dog, used such care and prudence as any man of ordinary care and prudence would use in the management of his own property under like circumstances. It did not distinctly appear whether the fence which separated the defendant's inclosure from the highway was or was not sufficient and legal fence. The referee assessed the damage sustained by the plaintiff at twelve dollars, and submitted to the court to decide whether, upon the facts reported, he was entitled to recover that sum, or nominal damages, or whether the defendant was entitled to judgment for his costs. The County Court, April Term, 1850 — Royce, C. J., presiding — rendered judgment, upon the report, for the defendant. Exceptions by plaintiff.

A. O. Aldis, for plaintiff.

H. E. Royce, for defendant.¹

The opinion of the court was delivered by

REDFIELD, J. In regard to the merits of the case, we suppose the case of *Clark v. Adams*² must be esteemed pretty much decisive upon all the points raised. The land there was not inclosed by a legal fence, so that the party could have obtained redress by impounding the cattle; and it was considered no obstacle to his driving the cattle off his inclosures by means of a dog, more than medium size, provided he did it in a prudent and careful manner, — all which is expressly found by the referee in the present case. Indeed, that case seems to us, in its facts and circumstances, even stronger than the present; and we must understand that if the defendant was guilty of no want of ordinary care in setting the dog upon the cow and in driving her out of the field, which is expressly stated by the referee, he did call the dog off as soon as possible, for that seems necessarily implied in the former finding. Any other construction would be a refinement upon the words used by the referee.

We do not suppose that it was indispensable to the defendant's right to impound creatures doing damage in his fields, that the fence adjoining the highway should have been legally sufficient, such fence being expressly excepted in the Revised Statutes, chap. 88, § 16. The law was otherwise under the former statute as to neat cattle, but must, I think, be considered as modified by that statute.

*Judgment affirmed.*³

¹ The arguments of counsel, and a part of the case not relating to the justification, are omitted. — Ed.

² 18 Vt. 425.

³ *Richardson v. Carr*, 1 Harringt. 142; *Grier v. Ward*, 23 Ga. 145; *Amick v. O'Hara*, 6 Blackf. 258; *Knott v. Digges*, 6 Har. & J. 230; *Wood v. LeRue*, 9 Mich. 158; *Totten v. Cole*, 33 Mo. 138; *Cory v. Little*, 6 N. H. 213; *Humphrey v. Douglass*, 11 Vt. 22; *Clark v. Adams*, 18 Vt. 425 *Accord.* — Ed.

REA v. SHEWARD.

IN THE EXCHEQUER, EASTER TERM, 1837.

[Reported in 2 Meeson & Welsby, 424.]

TRESPASS for breaking and entering a building and close of the plaintiff, and removing certain goods from the building, and depositing them upon the close. Pleas: fifthly, that R. C. was seised in fee of the building, and being so seised, demised it to the defendants, who thereupon entered, &c.; and because the said goods in the declaration mentioned were encumbering the said building, the defendants removed them to a small and convenient distance, to wit, into the said close of the plaintiff adjoining thereto, and there left them for the use of the plaintiff, the said close of the plaintiff being a convenient place for depositing the same, &c. The plaintiff replied that R. C. was not seised in fee, on which also issue was joined. At the trial before Parke, B., at the last Worcester assizes, the jury found a verdict for the defendant. In the present term

Godson, moved to enter up judgment for the plaintiff *non obstante veredicto*.¹ *Cur. adv. vult.*

On a subsequent day PARKE, B., delivered judgment. This was a case which stood over for our judgment on a motion made to enter up judgment *non obstante veredicto*. It was contended by Mr. Godson that the law did not allow a person to enter into a plaintiff's close, even for the purpose of depositing there the plaintiff's own goods which he had wrongfully placed on the premises of the defendant. When the case was moved, it occurred to me that there was an authority in Viner's Abridgment which would dispose of it. I have since found it; it is in title Trespass, 516, pl. 17 (I, a), and also in Roll. Abr. Trespass, I, pl. 17 (p. 566), where it is said that, "If a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff (as it was pleaded), inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them by tort of the plaintiff. P. 11 Car. B. R., between Cole and Maundy, adjudged upon a demurrer."² So, also, if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them *damage feasant*. Tyrringham's Case.³ There must, therefore, be no rule. *Rule refused.*⁴

¹ The argument for the plaintiff is omitted. — ED.

² 2 Roll. Ab. 566 a. c. — ED.

³ 4 Rep. 38 b.

⁴ Neaves v. Barrett, 6 Vict. R. (4) 165 *Accord*. — ED.

GILMAN v. EMERY.

SUPREME JUDICIAL COURT, MAINE, 1867.

[Reported in 54 Maine Reports, 460.]

ON EXCEPTIONS. Trespass to recover damages to plaintiff's horse and wagon.

It appeared that the plaintiff started with his brother to drive two heifers, from his stable, in Waterville, to another town. As they were passing defendant's premises, leading plaintiff's horse attached to his wagon, and driving the heifers, one of the latter turned and ran back. Whereupon the plaintiff hitched his horse to a shade-tree, twenty-two inches in diameter, standing upon the defendant's premises, but within the limits of the highway, and went back for his heifer. The defendant, seeing plaintiff's horse so hitched, removed him and hitched him to a post a few feet from the tree. When the plaintiff was returning for his horse, some twenty minutes afterwards, he saw his horse running through the streets, with halter dragging, and the wagon broken. There was no evidence as to the precise manner in which the defendant hitched the horse, or as to how he was freed from the post.

E. F. Webb, for the plaintiff.

Reuben Foster, for the defendant.

WALTON, J. Travellers have no right to hitch horses to shade-trees. It is well known that most horses have a propensity to gnaw whatever they are hitched to. Hitching-posts of the hardest wood have to be capped with iron, or they are soon so badly gnawed as to be ruined. Too many beautiful shade-trees, planted at great expense and watched for many years with anxious care, have been destroyed by having horses hitched to them, not to know that the practice is exceedingly dangerous. When, therefore, the owner of a shade-tree finds a horse hitched to it, he may immediately remove him to a place of safety, and such removal will not be a trespass.

In this case the defendant found a horse hitched to one of his shade-trees. He unhitched him and led him a few feet and hitched him to a post set in the ground on purpose to hitch horses to. This was not an act of trespass, and probably the plaintiff would not have complained of it but for the fact that his horse afterwards broke loose from the post and ran away and broke his wagon. But there is no evidence that the defendant did not use ordinary care in hitching the horse, and the plaintiff's writ does not charge him with negligence; it simply charges him with trespass *vi et armis*, in taking and carrying away the horse, buggy, &c.

The presiding judge being of opinion that the action could not be maintained, ordered a nonsuit, to which the plaintiff excepted. We cannot doubt that the nonsuit was rightly ordered.

*Exceptions overruled.*¹

¹ See *Young v. Vaughan*, 1 Houst. 331. — Ed.

ROBSON v. JONES.

COURT OF APPEALS, SOUTH CAROLINA, DECEMBER, 1830.

[*Reported in 2 Bailey, 4.*]

TRESPASS for breaking plaintiff's close, and carrying off his goods. The plaintiff, a merchant, contracted to purchase a wagon-load of cotton from the defendant at a stipulated price, and the cotton was turned out and weighed. It was then discovered that the cotton was fraudulently packed, and the plaintiff refused to take it at the price stipulated, but insisted upon a right to retain it, paying for it what, upon a survey by merchants, should be thought its value. To this the defendant objected; but the cotton was allowed to remain in plaintiff's yard until the next morning, when the defendant replaced it in his wagon. To prevent its removal, plaintiff locked his gate, which defendant broke, and forced his way out.

His Honor charged that, the cotton being fraudulently packed, the plaintiff had a right to refuse paying the price stipulated, but his doing so put an end to the contract of sale, and the defendant's title continued unimpaired. He had no right to insist upon a sale at a reduced price, which was a new contract, into which the defendant was not bound to enter; that as to breaking plaintiff's close, defendant had entered by plaintiff's consent, and he and his goods were detained there against his will; and under such circumstances he had a right to force his way out, and committed no trespass in doing so.

Verdict for defendant. Motion for new trial, on the ground of misdirection as to law and fact.

Hammond, for motion; *W. F. Desaussure*, contra.

JOHNSON, J., delivered the opinion of the court. The court is of opinion that the jury were correctly instructed as to the law of the case, and their finding as to the facts is conclusive.

Motion refused.

BURGESS v. GRAFFAM AND OTHERS.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS,
OCTOBER 31, 1883.[*Reported in 18 Federal Reporter, 251.*]

AT law.

Warren and *Brandeis*, for plaintiff.

Gray, *Cogswell* & *Appleton* and *W. L. Graffam*, for defendants.

LOWELL, J. In June, 1880, the defendant Graffam, having, as a judgment creditor, sold the land and house of the plaintiff for a small

debt, and having permitted the year of redemption to expire without actual notice to her, entered upon the house, which was vacant, and caused the plaintiff's furniture to be removed by the defendants Freeman, Elliot, and Hallahan, to the store-house of the defendant Eastman. In a suit in equity I held that no remedy could be had against these defendants and others for a conspiracy, because the conduct of Graffam, though harsh and immoral, was not illegal; but that the plaintiff might redeem her house from Graffam; and I intimated that if there were any remedy against the defendants for removing the furniture, it must be sought in an action of trespass or trover. *Burgess v. Graffam*.¹

This action contains counts in trespass and in trover, for removing and storing the plaintiff's furniture without notice to her.

The answer of each defendant contains a general denial, which is not objected to. In addition, the answer of Graffam alleges that he had both the right of property and the right of possession in the house; that he entered according to his right, and caused the furniture to be removed in a suitable and proper manner; and that the goods of the plaintiff were removed to a suitable and proper place, subject to the order of the plaintiff, of all which she was [afterwards] notified. The defendants Freeman, Elliot, and Hallahan answer that they were employed by Graffam to remove the furniture, which they did in a prudent and proper manner, and stored it in a suitable and proper place with the defendant Eastman. Eastman answers that he stored the goods in a suitable and proper manner, at the request of Graffam, and has always been ready to deliver them to the plaintiff.

To so much of the answers as contains the confession and avoidance, the plaintiff demurs.

The pleadings, and the case of *Burgess v. Graffam*, *supra*, to which both parties have referred in argument, show that these facts must be taken as true for the purposes of this demurrer: Graffam had the legal right to enter and possess the house; he made his entry without notice to the plaintiff, and gave her no notice of his intention to remove her furniture; but he did remove and store it in a safe place, without actual damage to the goods themselves; and then notified the plaintiff of what he had done.

The circumstances are unusual, and no cases very much in point have been cited in the able brief of the plaintiff. His analogy of the entry of a landlord upon a tenant at sufferance, is, however, pretty close; and in that case the tenant must be allowed a reasonable time to remove his goods.² I am of opinion that the counts in trover can-

¹ 10 Fed. Rep. 216.

² But if the tenant does not take away his goods in a reasonable time the landlord may remove them from his premises. *Stearns v. Sampson*, 59 Me. 568; *Manning v. Brown*, 47 Md. 506; *Clark v. Keliher*, 107 Mass. 406; *Overdew v. Semi*, 1 W. & S. 90; *Freeman v. Wilson*, 16 R. I. 524. —Ed.

not be sustained, because there has been no conversion. *Spooner v. Manchester*,¹ and cases cited in the opinion.

Trespass, on the other hand, will lie for nominal damages, at least. When the defendant Graffam, in the exercise of a legal right, made an entry, of which he knew that the plaintiff would not have actual notice, upon the vacant house which had lately been hers, it was, in my opinion, his duty to notify the plaintiff before he removed and stored her furniture. She had the right to say where it should be put, and with whom. The title to the house having been changed without her actual knowledge, she did not become a trespasser by leaving her furniture in the house until she had received such notice. Supposing that she is bound to some sort of constructive notice of the change of title by the sale upon the execution, and the expiration of the year of redemption, yet she was not bound by any such constructive notice to know when, if ever, the plaintiff would take possession of his newly acquired premises. He might have brought a writ of entry against her for the possession; or have taken it in some mode which would have informed her of his intention to take it. Graffam, therefore, had no right to put her furniture into the street, and no more right to store it with Eastman, though the damages for the one act may be very different from those which might have followed the other.

The answer is adjudged good to the counts in trover, but not to those in trespass.

WILLIAMS v. LADNER.

IN THE KING'S BENCH, NOVEMBER 24, 1798.

[Reported in 8 Term Reports, 72.]

TRESPASS. The case on the pleadings was shortly this: The plaintiffs, the tithe-owners, complained that the defendant's cattle have destroyed their tithes. The defendant, the landowner, says that the tithes were duly set out on his land, of which the plaintiffs had notice; that a reasonable time for removing them passed, and then the defendant put his cattle into his land to depasture it, and the cattle ate the tithes.²

Praed, for the defendant.

Gaselee, for the plaintiff.

LORD KENYON, C. J. This is a question of universal concern; but as the point appears to have been solemnly decided in this Court of Common Pleas near a century ago, and that judgment was founded on

¹ 133 Mass. 270.

² This short statement, taken from the argument of *Praed*, is given instead of the pleas *in extenso*; the argument of *Praed* is also omitted. — Ed.

a prior case in the 22 Car. II., in the court, I think it ought not now to be disturbed. That decision is also supported by reason; it is much better that the owner of the land should appeal to the laws of his country for redress than that he should take the law into his own hands. If the defendant were to succeed in this case, it would establish this proposition, that if cattle stray on the property of any person he may destroy them; but he is bound to drive them out in a reasonable manner. Here the defendant might either have brought an action against the plaintiffs for not taking away the tithes, or he might have distrained the tithes *damage feasant*. Without, however, inquiring into the reasons on which the case in 1 Ld. Raymond, 187, proceeded, it is sufficient for us to say that that case was fully considered, and that it was there decided that the owner of the land cannot turn out his cattle before the tithes are removed, but must resort to his action; and every case that inculcates the principle, that a party should apply to the law rather than take the law into his own hands, ought to be adopted in courts of justice.

LAWRENCE, J. I think there is a great deal of reason in the argument urged on behalf of the defendant in this case; but it would be too much for us to overset that case in Ld. Raymond, in which this point was decided. *Per curiam. Judgment for the plaintiffs.*¹

¹ Webb v. Paternaster, Godb. 282, Poph. 151, Palm. 71, Noy, 98, 2 Rolle R. 143, 152 s. c.

"And it was adjudged *per curiam* in this principal case that the plaintiff could not put in his cattle and eat the corn; for if that should be allowed, it would subvert the foundation of this action for the other part, which hath often been adjudged maintainable. Besides that, it is unreasonable that the plaintiff himself should be judge what is convenient time. And to permit him, if the corn is not removed at the day, to put in his cattle and eat all the corn, would be a much greater loss to the parson than that which the plaintiff hath sustained by the continuance of the corn upon the land. But it is much more reasonable to permit the plaintiff to bring an action against the parson, and so the court to be judge of the reasonableness of the time, and that the recompense be proportionable to the loss sustained. And therefore judgment was given for the plaintiff." — Shapcott v. Mugford, 1 Ld. Raym. 789. See Craven v. Hanley, Comyn, 548; Odgen v. Lucas, 48 Ill. 492. — Ed.

SECTION VI. (*continued.*)

(c) RECOVERY OF PROPERTY.

ANONYMOUS.

IN THE KING'S BENCH, TRINITY TERM, 1506.

[Reported in Keilwey, folio 92, placitum 4.]

TRESPASS for assault and battery and beasts taken. The defendant says as to all but the assault, not guilty; and as to the assault, that, before the trespass, he was possessed of a horse as of his own proper goods, and was possessed of it till the plaintiff took it out of his possession; and the defendant, the said day and year, requested it of the plaintiff, and the plaintiff said that he would not deliver it to him; and the defendant said that if he did not return it he would take it from him in spite of him; and then he took a staff that was lying on the ground, and came towards the plaintiff with the staff, which is the same assault for which the plaintiff has conceived his action. And the opinion of FINEUX and his companions was that this was an assault justifiable.

BLADES v. HIGGS.

IN THE COMMON PLEAS, JUNE 8, 1861.

[Reported in 30 Law Journal Reports, Common Pleas, 347.]

TRESPASS. Declaration, that the defendants assaulted and beat, and pushed about the plaintiff, and took from the plaintiff the plaintiff's goods, that is to say, dead rabbits.

Third plea, as to the assaulting, beating, and pushing the plaintiff, that the plaintiff at the said time when, &c., had wrongfully in his possession certain dead rabbits of and belonging to the Marquis of Exeter, and the said rabbits were then in the possession of the plaintiff without the leave and license and against the will of the said marquis, and the plaintiff was about wrongfully and unlawfully to take and carry away the said rabbits and convert the same to his own use, whereupon the defendants, as the servants of the said marquis, and by his command, requested the plaintiff to refrain from carrying away and converting the same rabbits, and to quit possession thereof to the defendants as such servants, which the plaintiff refused to do; and thereupon the defendants, as the servants of the said marquis and by his command, gently laid their hands upon the plaintiff, and took the

said rabbits from him, using no more force than necessary, which are the alleged trespasses.

Demurrer and joinder.

Beasley (June 3), in support of the demurrer.

Field, in support of the plea.¹

The judgment of the court² was now, June 8, delivered by

ERLE, C. J. In this case the declaration was for assault and battery, and the substance of the justification was, that the plaintiff having wrongfully in his possession rabbits belonging to the defendant (we consider the servants here the same as the master), and being about to carry them away, the defendant requested him to refrain, and on his refusal *molliter manus imposuit*, and used no more force than was necessary to take the rabbits from him. To this the plaintiff demurred, and thereby admits that he was doing the wrong, and that the defendant was maintaining the right, as alleged; and he contends that the defendant is not justified in using necessary force on account of the danger to the public, but adduces no authority to support his contention. The defendant also has adduced no case where this justification was supported without an allegation to explain how the plaintiff took the property of the defendant and became the holder thereof. But the principles of law are in our judgment decisive to show that the plea is good, although that allegation is not made. If the defendant had actual possession of the chattel, and the plaintiff took it from him against his will, it is not disputed that the defendant might justify using the force sufficient to defend his right and retake the chattel; and we think that there is no substantial distinction between that case and the present; for if the defendant was the owner of the chattel, and entitled to the possession of it, and the plaintiff wrongfully detained it from him after request, the defendant in law would have the possession, and the plaintiff's wrongful detention against the request of the defendant would be no possession, but would be the same violation of the right of property as the taking of the chattel out of the actual possession of the owner. It has been decided that the owner of land entitled to the possession may enter thereon and use force sufficient to remove a wrong-doer therefrom. In respect of land as well as chattels the wrong-doers have argued that they ought to be allowed to keep what they are wrongfully holding, and that the owner cannot use force to defend his property, but must bring his action, lest the peace should be endangered if force was justified. See *Newton v. Harland*. But in respect of land, that argument has been overruled in *Harvey v. Brydges*.³ There, Parke, B., says, "Where a breach of the peace is committed by a freeholder, who, in order to get possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public for a forcible entry, he

¹ The arguments of counsel are omitted. — Ed.

² Erle, C. J., Willes, J., and Byles, J.

³ 14 M. & W. 437.

is not liable to the other party; and I cannot see," he says, "how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly, even though in so doing a breach of the peace was committed."

In our opinion all that is so said of the right of property in land applies in principle to the right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the mischief instead of redressing it; and on these grounds our judgment is for the defendants. *Judgment for the defendants.*¹

BOBB v. BOSWORTH.

IN THE COURT OF APPEALS, KENTUCKY, NOVEMBER 24, 1808.

[Reported in 2 *Littell, Selected Cases*, 81.]

THIS was an action of assault and battery, brought by Bosworth against Bobb, in which "not guilty" was pleaded, with leave to give special matter in evidence. A verdict having been found for the plaintiff, a new trial was moved for by the defendant, which was overruled. Whereupon he filed a bill of exceptions, containing the whole evidence given on both sides, and appealed to this court, in which he hath assigned for error, that a new trial ought to have been granted.

This will depend upon the question, in what cases, and in what manner can the right of recaption be lawfully exercised? There is

¹ In the following cases a battery committed by the defendant in the recaption of his personal property from the plaintiff was adjudged excusable:—

Rex v. Milton, M. & M. 107. (B. gave A. a paper to read, and return on the spot. A. was about to carry it off.)

Wright v. So. Co., 80 Fed. R. 85. (A., a trespasser, was carrying off B.'s parrot.)

Baldwin v. Hayden, 6 Conn. 453 (similar to *Rex v. Milton*).

Commonwealth v. Donahue, 148 Mass. 529 (similar to *Rex v. Milton*, *supra*).

Hamilton v. Barker (Mich. 1898), 75 N. W. R. 133. (A. was stealing fruit on B.'s land.)

State v. Elliot, 11 N. H. 540. (Wrongful taking by A. from B.'s premises. Fresh pursuit, and recaption about one hundred rods from the place of taking.)

Stirling v. Warden, 51 N. H. 217. (Very special in its circumstances. A new postmaster commits battery in taking possession of the property of the United States.)

Hopkins v. Dickson, 59 N. H. 235. (Wrongful taking by A. How fresh the pursuit was, does not appear.)

Gyre v. Culver, 47 Barb. 592. (A. was stealing wood on B.'s land.)

Anderson v. State, 6 Baxt. 608. (A. got money from B. by fraud. B., discovering the fraud, immediately took the money from A.)

Hodgden v. Hubbard, 18 Vt. 504. (A. fraudulently bought a stove. B. on the same day pursued A., and overtook him two miles from place of purchase.)

Johnson v. Perry, 56 Vt. 703. (A., on B.'s land, was wrongfully putting slabs on his sled. B. took the slabs off the sled.)

See also *Barr v. Post*, 56 Neb. 699. — ED.

no doubt, but that one having either the general or a special right of property in personal chattels, may, if wrongfully dispossessed thereof, retake them wherever he can find them, provided he can obtain peaceable possession; but the law more highly regards the public peace, than the right of property of a private individual, and therefore forbids recaption to be made in a riotous or forcible manner. The law, however, permits the possessor of property to maintain his possession by force, where force is used in attempting to divest his possession; the law, in that case, permits the party in possession to oppose violence to violence. It is material, whether the violence has been used to regain a possession which had been previously lost, or whether it has been used to maintain a present possession. In the former, it is unlawful; in the latter, lawful.

In the case now before the court, it appears that Bosworth, at the time the assault and battery was committed, was in possession of the slave, which was the subject of dispute between the parties; that Bobb came, with others, to retake him out of Bosworth's possession in a violent and forcible manner, which was resisted by Bosworth; and, in the scuffle, Bobb broke the arm of Bosworth. It is not material, whether Bobb or Bosworth had the better right to the negro. Bosworth was in actual possession; Bobb could not lawfully use violence and force in regaining possession. Having broken the peace, and used force, where he was forbidden by law to do so, he must be answerable for the consequences.

*Judgment affirmed, with damages and costs.*¹

¹ In the following cases a battery committed upon a wrongful possessor in the recaption of personal property by its owner was held to be unjustifiable:—

Sabre v. Mott, 88 Fed. R. 780, 97 Fed. R. 985. (Paid mortgagee refused to surrender a contract to which defendant was entitled.)

Street v. Sinclair, 71 Ala. 110 (*semble*. Mortgagee entitled to possession may not commit battery in getting possession. Approved in *Burns v. Campbell*, 71 Ala. 271, 287, and *Story v. State*, 11 Ala. 323, 338).

Andre v. Johnson, 6 Blackf. 375. (How the possessor obtained the property, and how long he had held it, the report does not disclose.)

Stuyvesant v. Wilcox, 92 Mich. 233 (*semble*).

Shellabarger v. Morris, 115 Mo. Ap. 566 (owner of hen, which had strayed upon plaintiff's land, beat plaintiff, while trespassing on his land).

Davis v. Whitridge, 2 Strob. 232. (Plaintiff in possession under a bailment at will.)

Harris v. Marco, 16 S. Ca. 575. (Plaintiff, in view of the defendant, seized and was about to lead away the latter's horse left by him temporarily in a public square.)

Bowman v. Brown, 55 Vt. 184. (Plaintiff acquired possession rightfully.)

Stanley v. Payne, 78 Vt. 235. (Plaintiff obtained possession rightfully.)

Barnes v. Martin, 15 Wis. 240. (Plaintiff was in peaceable, though wrongful, possession. Mode of acquiring possession and its duration not made clear.)—ED.

KIRBY v. FOSTER AND ANOTHER.

IN THE SUPREME COURT, RHODE ISLAND, JULY 25, 1891.

[Reported in 22 Atlantic Reporter, 1111.]

STINESS, J.¹ The plaintiff was in the employ of the Providence Warehouse Company, of which the defendant, Samuel J. Foster, was the agent, and his son, the other defendant, an employee. A sum of \$50, belonging to the corporation, had been lost; for which the plaintiff, a book-keeper, was held responsible, and the amount was deducted from his pay. On January 20, 1888, Mr. Foster handed the plaintiff some money to pay the help. The plaintiff, acting under the advice of counsel, took from this money the amount due him at the time, including what had been deducted from his pay, put it into his pocket, and returned the balance to Mr. Foster, saying he had received his pay and was going to leave, and that he did this under advice of counsel. The defendants then seized the plaintiff, and attempted to take the money from him. A struggle ensued, in which the plaintiff claims to have received injury, for which this suit is brought. The jury having returned a verdict for the plaintiff, the defendants petition for a new trial on exceptions to the rulings and refusals to rule of the presiding justice. It is unnecessary to repeat the several exceptions, since they involve substantially but one question, viz., whether the defendants were justified in the use of force upon the plaintiff to retake the money from him. As the defendants only pleaded the general issue, all requests relating to justification might properly have been refused on that ground.² The case, however, having been tried upon the defence of justification, we will consider the exceptions as though that defence had been pleaded. The defendants contend that the relation of master and servant subsisted between the plaintiff and Samuel J. Foster, the manager of the warehouse, whereby possession of money by the plaintiff was constructively possession by the manager, acting in behalf of the company; and that, the money having been delivered to the plaintiff for the specific purpose of paying the help, his conversion of it to his own use was a wrongful conversion, amounting to embezzlement, which justified the defendants in using force in defence of the property under their charge. Unquestionably, if one takes another's property from his possession, without right and against his will, the owner or person in charge may protect his possession, or retake the property, by the use of necessary force. He is not bound to stand by and submit to wrongful dispossession or larceny when he can stop it, and he is not guilty of assault, in thus defending his right, by using force to prevent his property from being carried away. But this right of defence

¹ Only the opinion of the court is given. — Ed.

² 1 Chit. Pl. 501; 2 Greenl. Ev. § 92.

and recapture involves two things: *First*, possession by the owner; and, *second*, a purely wrongful taking or conversion, without a claim of right. If one has intrusted his property to another, who afterwards, honestly, though erroneously, claims it as his own, the owner has no right to retake it by personal force. If he has, the actions of replevin and trover in many cases are of little use. The law does not permit parties to take the settlement of conflicting claims into their own hands. It gives the right of defence, but not of redress. The circumstances may be exasperating; the remedy at law may seem to be inadequate; but still the injured party cannot be arbiter of his own claim. Public order and the public peace are of greater consequence than a private right or an occasional hardship. Inadequacy of remedy is a frequent occurrence, but it cannot find its complement in personal violence. Upon these grounds the doctrine contended for by the defendants is limited to the defence of one's possession and the right of recapture as against a mere wrong-doer. It is therefore to be noted in this case that the money was in the actual possession of the plaintiff, to whom it had been intrusted for the purpose of paying help, who thereupon claimed the right to appropriate it to his own payment, supposing he might lawfully do so. Conceding that the advice was bad, nevertheless, upon such appropriation, the plaintiff held the money adversely, as his own, and not as the servant or agent of the company. If his possession was the company's possession, then the company was not deprived of its property, and there could be neither occasion nor justification for violence. Possession by the company would be constructive merely, which would cease when the plaintiff exercised dominion and control on his own behalf under an honest claim of right. It is only in this way, in many cases, that conversion is established. Having thus appropriated the money to himself, it is urged that the act amounted to embezzlement, which justified the intervention of the defendants to prevent the consummation of the crime. We do not think this is so. The plaintiff stated what he had done, and the grounds upon which he claimed the right to do it, handing back the balance above what was due him. A controversy followed. He started to go out, but was stopped by the defendants, and then the assault took place. The sincerity of the plaintiff's belief that he had a right to retain the money is unquestionable. Hence, as stated in *Cluff v. Insurance Co.*,¹ cited by the defendants, even a forcible taking of property, "if done under an honest claim of right, however ill founded, would not constitute the crime of robbery or larceny; because, where a party sincerely, though erroneously, believes that he is legally justified in taking property, he is not guilty of the felonious intent which is an essential ingredient of these crimes."

In the most favorable view of the case for the defendants, the plaintiff, having obtained the money by no crime, misrepresentation, or

¹ 13 Allen, 308.

violence, nor against the will of its owner, retained it wrongfully. In such cases the rule is clearly stated in *Bliss v. Johnson*,¹ "The general rule is that a right of property merely, not joined with the possession, will not justify the owner in committing an assault and battery upon the person in possession, for the purpose of regaining possession, although the possession is wrongfully withheld." See, also, *Harris v. Marco*,² *Barnes v. Martin*,³ *Andre v. Johnson*.⁴ In *Commonwealth v. McCue*,⁵ it was held that an owner of cattle, which had been taken up by one who claimed to be a field driver, had no right to commit an assault in retaking his property, even though the complainant acted only as an officer *de facto*, and demanded illegal fees. But, it is said, the plaintiff was about to carry away the money against the will of the owner. Undoubtedly this was so; but this is true in every case of wrongful conversion of property. If it be not taken against the will of the owner, it cannot be retaken by force, but only by the usual civil remedy.

The defendants cite the following cases, which, it will be seen, are plainly distinguishable from the case at bar: *Blades v. Higgs*. This was on demurrer to a plea which set up that the plaintiff had possession, wrongfully and against the will of the owner, of certain property, which the plaintiff was about to carry away. The plea was held to be a good justification for necessary force, upon the assumed ground that the defendants had actual possession of the chattels, which the plaintiff took against their will. In *Johnson v. Perry*,⁶ and *Gyre v. Culver*,⁷ there was no claim of right on the part of the plaintiff to the property he had taken. In *Hodgeden v. Hubbard*,⁸ the plaintiff obtained the property by false representations. *Baldwin v. Hayden*,⁹ apparently sustains the defendant's contention that an owner has a right to retake property intrusted to another, if he is about to carry it away; yet it does not appear in that case that the defendant made any claim of title to the paper in question, only that he supposed he had permission to take it away. *State v. Elliot*,¹⁰ is in the same line, but extremely guarded in expression. It appears to have been a very slight assault, which the court was quite willing to justify, without consideration of authorities. But the court says the right of recapture of property is far more limited than that of its defence, and recognizes the question whether the person removing it is a mere wrong-doer as one of the questions to be determined.

The defendants object to the charge of the court that, where a person has come into the peaceable possession of a chattel from another, the latter has no right to retake it by violence, whether the possession is lawful or unlawful, upon the ground that this rule would prevent the recapture of property obtained by trickery or fraud. The instruction

¹ 73 N. Y. 529.

² 16 S. Ca. 575.

³ 15 Wis. 240.

⁴ 6 Blackf. 375.

⁵ 16 Gray, 226.

⁶ 56 Vt. 703.

⁷ 47 Barb. 592.

⁸ 18 Vt. 504.

⁹ 6 Conn. 453.

¹⁰ 11 N. H. 540.

must be considered, not as an abstract proposition, but with reference to the case before the jury. Nothing appeared to show that the money had been procured by misrepresentation, trickery, or fraud. It was delivered to the plaintiff voluntarily, in the usual course of business. True, under the advice of a lawyer whom he had consulted, the plaintiff had previously determined to apply the money to his own payment when he should receive it; but this did not make the delivery itself fraudulent, nor did his intent to assert what he believed to be his right make that intent criminal. We think, therefore, with reference to the case as it stood, there was no error in the charge as given, nor in the refusals to charge as requested. *Exceptions overruled.*¹

NEWTON v. HARLAND.

IN THE COMMON PLEAS, JUNE 26, 1840.

[Reported in 1 *Manning & Granger*, 644]

TRESPASS for an assault and battery by the defendant upon the plaintiff Frances, the wife of the plaintiff Augustus Newton.

Pleas: first, not guilty, whereon issue was joined; secondly, as to the assaulting, seizing, and laying hold of the said Frances, and pulling, thrusting, pushing, and dragging her about, and forcing and compelling her to go into a certain highway, as in the declaration mentioned, that the defendant Harland, before and at the said time when, &c., was lawfully possessed of a certain dwelling-house, with the appurtenances, situate and being at Studley, in the county of York, and being so possessed thereof, the said Frances just before the said time when, &c., to wit, on the same day and year in the declaration mentioned, was unlawfully in the said dwelling-house, and with force and arms making a great noise and disturbance therein, and at the said time when, &c., stayed and continued therein making such noise and disturbance without the leave or licence and against the will of the defendant Harland, and during all that time greatly disturbed and disquieted the defendant Harland in the peaceable and quiet possession and enjoyment of his said dwelling-house, and thereupon the defendant Harland then requested the said Frances to cease making her said noise and disturbance, and to go and depart from and out of the said dwelling-house, which the said Frances then wholly refused to do, whereupon the defendant Harland, in defence of the possession of his said dwelling-house, and the defendant Bailey, as his servant and by his command, at the said time when, &c., gently laid their hands upon the said Frances in order to remove, and did then remove, the said Frances from and out of the said dwelling-house, and in so doing did necessarily a

¹ *Salisbury v. Green* (R. I. 1892), 24 Atl. R. 787 (*semble*) *Accord.* — *Ed.*

little pull, thrust, push, and drag her about, and force and compel her to go into the said highway, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the said Frances on that occasion, which are the said supposed trespasses in the introductory part of the plea mentioned, and whereof the plaintiffs have complained against the defendants. Verification.

Replication *de injuria* to the second plea.

The cause was tried before Parke, B., at the summer assizes for the county of York, 1837. The facts were not very clearly ascertained at this trial, but, as they ultimately appeared at the subsequent trials, they were as follows: The plaintiff A. Newton, on the 1st of September, 1836, hired of the defendant Harland, for the period of six months, several rooms in a house which Harland occupied at Studley, near Ripon, in the county of York. The six months expired on the 1st of March, 1837, and the rent not having been paid, Harland on the following day, and the other defendant Bailey, as his assistant, distrained the goods of the plaintiff A. Newton; and Mrs. Newton having locked the doors of the rooms, and refused to give up the keys, Harland employed a blacksmith to pick the locks. In the evening of the same day Mrs. Newton was requested to quit the premises, and having refused, Harland again entered the rooms, accompanied by four or five persons, and compelled Mrs. Newton and her children and servants to leave the apartments, Harland himself laying hold of Mrs. Newton's arm, and leading her out.

Upon the facts as proved at the first trial, Parke, B., told the jury that the second plea was made out, and directed them to find the issue raised by that plea for the defendants. The jury having, in pursuance of this direction, found their verdict on the second issue for the defendants,

Wilde, Serjt., in Michaelmas term, 1837, obtained a rule for a new trial, on the ground of misdirection, contending that the evidence given in support of the second plea established no justification in respect of the assault, and that the fact of the plaintiff A. Newton being in possession of the premises having been admitted by the distress, the defendant Harland was guilty of an indictable offence in forcibly expelling Mrs. Newton and her family from the apartments.

Alexander and Tomlinson, in the following Easter term, showed cause.

TINDAL, C. J. This case involves an important question; namely, whether a landlord has a right to enter and expel by force a tenant who holds over after his term has expired. I should have great difficulty in agreeing to the affirmative of that proposition, for I do not see how the defendants can justify the expulsion of the female plaintiff under a possession obtained by an act which in itself is criminal. It seems to me that the cause must go down again to a new trial, in order that the facts with respect to the time and the manner of the entry by the defendants may be more precisely ascertained, and the matter placed

in such a shape as will enable either party, if so advised, to obtain the judgment of a court of error upon the point.

PARK and BOSQUANET, JJ., concurred.

COLTMAN, J. I express no opinion on the main point, but I think that the parties should not be concluded by the judgment of this court.

Rule absolute.

The cause was again tried, before Alderson, B., at the Yorkshire summer assizes, 1838. The facts having been given in evidence, and *Hillary v. Gay*,¹ cited on the part of the plaintiffs, the learned Baron told the jury that the questions for them to consider were, whether the apartments had been hired by the plaintiff A. Newton for a certain term which had expired, and whether Mrs. Newton, on being required to quit, had refused to do so. The learned Baron said that, if these facts were made out to their satisfaction, they must find for the defendants on the second issue; but lest the Court of Common Pleas should not agree in opinion with him, his Lordship directed the jury to assess the damages upon that issue contingently.

The jury returned their verdict for the plaintiffs on the first issue, and for the defendants on the second, and they assessed the contingent damages at £100. The counsel for the defendants, however, objected that the damages could not be so assessed without their consent, whereupon the associate entered the verdict without the assessment of damages.

Warren, in Michaelmas term, 1837, in pursuance of leave reserved to him at the trial, moved to enter a verdict for the plaintiffs on the second issue for the damages assessed by the jury, or for a new trial on the ground of misdirection. The court refused a rule to enter a verdict for the plaintiff on the second issue for the damages contingently assessed, as the defendants had not consented to the assessment, but granted a rule for a new trial.

The court, which was composed of TINDAL, C. J., and VAUGHAN, COLTMAN, and ERSKINE, JJ., took time to consider; but Mr. Justice VAUGHAN dying, and Mr. Justice COLTMAN differing in opinion from the Lord Chief Justice and Mr. Justice ERSKINE, the court desired that the case might be re-argued. It was accordingly again argued in Easter term last, before TINDAL, C. J., and BOSANQUET, COLTMAN, and ERSKINE, JJ.

Tomlinson, for the defendants.

Newton, in support of the rule.²

TINDAL, C. J. This case involves a question of great importance and one of very general application; namely, whether, after a tenancy has been determined by a notice to quit, the landlord may enter on the premises whilst the tenant still remains personally in possession, and after requesting him to depart and give up the possession, and his refusing so to do, may turn him out of possession by force, using as

¹ 6 C. & P. 284.

² The arguments of counsel are omitted. — Ed.

much force and no more than is necessary for that purpose. Upon the pleadings in this case the plaintiff and his wife declare for an assault on the wife and forcing her into the street; and the defendants justify by reason of the landlord being in the lawful possession of the house, and the wife of the tenant being unlawfully therein, and disturbing him in his enjoyment thereof, whereupon they gently put out the wife, who had refused, when requested, to depart from the same.

The point above stated must be necessarily determined before this case is ultimately decided. It appears, however, to me that such question cannot, upon the present finding of the jury, be properly brought before us; but that there is a preliminary question which must be first ascertained, namely, whether, upon the facts in this case, the landlord entered upon the premises in a forcible manner, against the provisions and enactments of the statutes made against forcible entry, or, at all events, so as to render himself liable to an indictment at common law. For if the landlord, in making his entry upon the tenant, has been guilty either of a breach of a positive statute, or of an offence against the common law, it appears to me that such violation of the law in making the entry causes the possession thereby obtained to be illegal; and that the allegation in the plea that one of the defendants was lawfully in possession at the time the assault was committed is negatived.

In the present case, the defendant Harland, accompanied with five other men, entered into the apartments which had been in the plaintiff's occupation, whilst his wife still remained in possession, under circumstances which, at least, leave it as a question for the jury to determine, with proper directions from the judge at the trial of the cause, whether such entry was forcible or not. The case, indeed, was sent down by the court to a second trial for the express purpose of the jury finding this point, either in the negative or the affirmative. The point, however, has not been left to them; and I think, upon this ground, without entering into any discussion of the question to which I have above adverted, on which I forbear at present to state my opinion, that the cause should go down to another trial.

BOSANQUET, J. I agree with my Lord Chief Justice in thinking that a new trial ought to be granted in this case. Some things are clear. If a tenant hold over the land after the expiration of his term, he cannot treat the lessor who enters peaceably as a trespasser; and the lessor, in such case, may justify his own entry upon the land by virtue of his title to the possession. *Taylor v. Cole*; ¹ *Taunton v. Costar*.² On the other hand, the lessor, who is out of possession, cannot maintain an action of trespass against the tenant holding over. He must first acquire a lawful possession before he can maintain such action. But if the lessor enter upon the land to take possession, he may treat as trespassers all those who afterwards come upon it: *Hey v. Moorhouse*; ³ or who, having unlawfully taken possession, wrongfully con-

¹ 3 T. R. 295.

² 7 T. R. 481.

³ 6 New Cases, 52; 8 Scott, 156.

tinue upon the land, as in the case of *Butcher v. Butcher*,¹ where the defendant had come into possession of the land by intrusion, and the rightful owner, having entered, was held entitled to maintain an action of trespass against him.

The lessor may even break and enter a house, provided it be empty, which has been occupied and held over by his tenant, though the tenant may have left some of his property therein. *Turner v. Meymott*.² But no case has yet been decided in which the lessor has been held to be justified in expelling by force from a dwelling-house a person who, having lawfully come into possession of it, has merely continued to hold possession after the expiration of his title.

The lessor who is entitled to possession may acquire such possession by lawful entry; but entry by force is not lawful. Such entry is expressly prohibited by the statute 5 Rich. II. c. 7, even where entry is given by law: "The king defendeth that none shall make entry on lands and tenements but in cases where entry is given by law; and in that case not with strong hand nor with multitude of people, but only in a peaceable and easy manner." And in Bacon's Abr. Forcible Entry (B), it is laid down that, if a man enter peaceably into a house, but turns the party out of possession by force, or by threats frighten him out of possession, this is a forcible entry. It was said in one case by Lord Kenyon, *Taunton v. Costar*,³ that if the party had entered and expelled the tenant by force, he might have been indicted for a forcible entry; from which it seems to have been supposed that the entry was valid, though the party entering might be indicted for it. But if the act be expressly prohibited by statute, it must, I apprehend, be illegal and void. The case before Lord Kenyon was not a case of force; and his expressions in a former case are, "A person having right of possession may peaceably assert it if he does not transgress the law of his country. He may enter peaceably and retain it, and plead *liberum tenementum*." *Taylor v. Cole*.⁴ If the lessor enter with a strong hand, his act is unlawful, and he cannot, as it seems to me, acquire lawful possession by an unlawful act.

This is an action for assault and battery. The defendant Harland justifies his act upon the ground that he was lawfully in possession; that the plaintiff Mrs. Newton was on the premises, was required to go away, and refused, whereupon he removed her in defence of his possession, using no more force than was necessary. To maintain this plea the defendants must be prepared to show that the defendant Harland had lawfully acquired possession, which, from the reason already stated, I think he had not, if force was employed to obtain it.

The opinion of Lord Lyndhurst, in the case of *Hillary v. Gay*,⁵ appears to me to be in point. That was an action of trespass for breaking and entering a room of the plaintiff's, being parcel of a dwelling-house. At the trial it appeared that the house belonged to the defendant, who had

¹ 7 B. & C. 399.

² 1 Bing. 158.

³ 7 T. R. 431.

⁴ 3 T. R. 295.

⁵ 6 C. & P. 284.

let it to a person named Jury, who had underlet a part of it to the plaintiff; that Jury was under notice to quit at Midsummer, 1833, but that the plaintiff did not quit at that time, and the defendant had in August distrained his goods for the rent due up to Midsummer. The defendant procured a number of Irishmen to go to the house, and, after getting the plaintiff to go away, by sending a boy to tell him that he was wanted by his master, the Irishmen entered the plaintiff's room and turned his wife into the street, and put his furniture out at the window. Lord Lyndhurst held that the conduct of the defendant could not be justified.

It is quite unnecessary to say whether, if the defendant had quietly entered and obtained possession of the house while the plaintiff's wife remained in possession of her apartment, he could have justified turning her out by force. The passage referred to in Bacon's *Abr. tit. Forcible Entry and Detainer* (B), treats the force employed in turning a party out as making the original entry, though peaceable, a forcible entry within the meaning of the statute. In *The King v. Wilson*,¹ Lord Kenyon says, "It is alleged that twelve persons, with force and arms, and with a strong hand, entered into a certain mill and lands and houses, and expelled the prosecutor; if these facts be proved as laid, God forbid that it should not be an indictable offence! the peace of the whole country would be endangered if it were not so;" and afterwards adds, "In supporting the indictment we shall give effect to a part of the law that ought to be preserved; namely, that no one shall with force and violence assert his own title." Mr. Justice Grose says that the words of the indictment clearly amount to a public breach of the peace. Mr. Justice Lawrence says: "In an indictment on the statute it is sufficient to state the defendant entered with a strong hand, it being considered that these words imply that the entry was accompanied with that terror and violence which constitute the offence. All that is required is, that it should appear by the indictment that such force and violence have been used as constitute a breach of the peace."

In the present case there was evidence tending to show that the entry of the defendant was made with a strong hand, and accompanied with such acts of violence as to bring the case within the prohibition of the statute of 5 Rich. II. But this evidence appears to have been considered by the learned judge as immaterial, for he said the only questions were, whether the rooms were let for a certain term, whether the term was over, and, if so, whether the plaintiff, when required, would not go out. If that was proved, he said, the verdict in law must be for the defendant.

This direction appears to me to be incorrect, and that there ought therefore to be a new trial.²

COLTMAN, J. Having the misfortune in this case to differ from the rest of the court, it is right that I should state the grounds of my opin-

¹ 8 T. R. 360.

² The concurring opinion of Erskine, J., is omitted. — ED.

lon; but as the case will go to a new trial, and the question may be raised in a more formal way on the record, it will be sufficient to state them very briefly.

The law of England recognizes two modes of asserting the right to lands wrongfully withheld, — by entry and by action.

In the cases by which the remedy by entry was allowed, where, to use the phrase so familiarly met with in our old books, the entry is congeable, the remedy by entry was looked upon as favorably as the remedy by action. The effect of such an entry is, that it gives a man seisin, or puts into immediate possession him that has right of entry on the estate, and thereby makes him complete owner. 3 Bl. Comm. 176. Agreeably to this, Mr. Justice Bayley said, in the case of *Butcher v. Butcher*:¹ "I think that a party having the right to the land acquires by entry the lawful possession of it, and may maintain trespass against any person who, being in possession at the time of the entry, wrongfully continues on the land."

I am not aware that any doubt exists that, after the entry made, he may turn any ordinary trespasser off the land; and I am unable to see any principle which should prevent him from treating his tenant at sufferance in the same way, for such a tenant is a mere wrong-doer. Co. Litt. 57 b; *Pike and Hassen's Case*; ² *Sir Moil Finche's Case*.³

But it is said that a person who has a right of entry ought to enter peaceably. The true doctrine on this subject is stated, as I apprehend, correctly in the case of *Taylor v. Cole*,⁴ where it is said: "It is true, persons having only a right are not to assert that right by force; if any violence is used, it becomes the subject of a criminal prosecution." So, in *Taunton v. Costar*,⁵ it is said: "If the landlord had entered with a strong hand to dispossess the tenant by force, he might have been indicted for a forcible entry; but there can be no doubt of his right to enter upon the land at the expiration of the term."

For the preservation of the peace, the law will punish for the forcible entry; but the tenant at sufferance, being himself a wrong-doer, ought not to be heard to complain in a civil action for that which is the result of his own misconduct and injustice.

The distinction between the civil rights of a person forcibly turned out of the possession of land, and the penal sanctions by which he is protected from being forcibly dispossessed, are drawn in a marked way in the cases in our old books relating to the statutes of forcible entry. Although, by those statutes, all forcible entries were prohibited, even by those who had title to enter, yet the party dispossessed could maintain no action on the statutes. This is pointedly laid down in the Year-Book, 9 Hen. VI. 19; 15 Hen. VII. 17; F. N. B. 248 H.

On these grounds I am of opinion that, although the defendant, if guilty of a forcible entry, is responsible for it in the way of a criminal

¹ 7 B. & C. 399.

² 8 Leon, 233.

³ 2 Leon, 143.

⁴ 3 T. R. 295.

⁵ 7 T. R. 431.

prosecution, yet that, as against the plaintiffs, who are wrong-doers, and altogether without title, he has obtained by his entry a lawful possession, and may justify in a civil action the removing them, in like manner as in the case of any other trespasser. *Rule absolute.*¹

BEDDALL v. MAITLAND.

IN CHANCERY, BEFORE SIR EDWARD FRY, J., MARCH 8, 1881.

[Reported in 17 Chancery Division, 174.]

THE defendant on the 23d of March, 1880, delivered a statement of defence and counter-claim.²

In his counter-claim he alleged that Poulton, aided and abetted therein by Beddall, on the 5th of January, 1880, unlawfully and by force broke into and ejected the defendant from the house occupied by him and violently put him and his family out of the house, and also violently and recklessly threw thereout and unlawfully took possession of and damaged his goods and effects, and by such unlawful acts greatly injured the defendant and caused him damage to the amount of £1000. And the defendant claimed damages for alleged breaches of contract by the plaintiffs respectively, and also in respect of the injuries alleged to have been committed by them respectively.

By the evidence at the trial it appeared that on the 5th of January, 1880, a Mr. Robertson, who was a clerk to the plaintiffs' solicitors, by the instructions of Poulton, went, accompanied by several men, to the nursery to demand from the defendant immediate possession. According to Robertson's evidence, he was admitted without any resistance at the front door of the house, and told the defendant what he had come for. They had some conversation together, and they then went out of the house together to look at the stock in the nursery. While they were outside, the defendant suddenly ran back into the house and locked the door, and refused to allow Robertson to re-enter. Robertson, then, with the assistance of the men he had brought with him, forcibly broke

¹ *Hillary v. Gay*, 6 C. & P. 284; *Edwick v. Hawkes*, 18 Ch. D. 199; *Denver R'y v. Harris*, 122 U. S. 597, 607; *Larkin v. Avery*, 23 Conn. 304; *Reeder v. Purdy*, 41 Ill. 279; *Comstock v. Brosseau*, 65 Ill. 43; *Todd v. Jackson*, 2 Dutch. 525, 531; *Hyatt v. Wood*, 3 Johns. 239; 4 Johns. 150, 160; *Parsons v. Brown*, 15 Barb. 590; *Wood v. Phillips*, 43 N. Y. 152; *Bliss v. Johnson*, 73 N. Y. 529; *McMillan v. Cronin*, 75 N. Y. 474, 478; *Bristol v. Burr*, 120 N. Y. 427; *O'Donnell v. McIntyre*, 37 Hun, 623, 627 (see *Scribner v. Beach*, 4 Den. 448, 451); *Pilford v. Armstrong*, Wright (Ohio), 94; *Sinclair v. Stanley*, 69 Tex. 718; *Dustin v. Cowdry*, 23 Vt. 631 (*semble*) *Accord*.

See also *Canavan v. Gray*, 64 Cal. 5; *Franck v. Wiegert*, 56 Mich. 472, 476.

The law of Scotland seems to accord with *Newton v. Harland*. *Smith, Law of Damages*, 124, 125. — Ed.

² Only so much of the case is given as relates to the counter-claim. The arguments of counsel are also omitted. — Ed.

open the back door of the house. The defendant offered no further resistance, and then Robertson and his men turned the defendant and his family out, and put his furniture out of the house.

According to the defendant's evidence, Robertson obtained possession in the first instance by force.

Beaumont, for the defendant.

Cookson, Q. C., and *E. S. Ford*, for the plaintiffs.

Fry, J. The question which I reserved for further consideration arises on the defendant's counter-claim. The claim subdivides itself into two heads, — the one for the forcible entry and eviction, the other for the injury done to the defendant's furniture and effects; and, in my judgment, separate considerations arise with regard to these two heads. According to the evidence the defendant was, in my judgment, in possession of the house by leave of the owners, it having been occupied by him as the manager of the nursery. He was not in possession of the house in the same sense as he was in possession of the nursery; with regard to the nursery he was in the position of an ordinary servant, being only the manager for the plaintiffs; but he was by the plaintiffs' permission in the exclusive possession of the house. That permission, however, had been withdrawn before the 8th of January, and the defendant had retained possession and was then in possession as a wrongdoer. Upon the evidence I come to the conclusion that a forcible entry was made by Robertson on the 8th of January as agent of the plaintiff Poulton only, but that the plaintiff Beddall had nothing to do with it. Different accounts of what took place are given by Robertson, and by the defendant, but it appears to me immaterial which account is true, for in either view the defendant's possession at the time when the forcible entry was made was wrongful. The questions which then arise are complicated by this consideration, that, if the possession of the defendant was unlawful, the forcible entry of the plaintiff was also unlawful. The taint of unlawfulness attaches to them both. The unlawfulness of the plaintiffs' entry arises under the statute 5 Rich. 2, stat. 1, c. 8, which enacts, "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the King's will." This statute creates one of the great differences which exist in our law between the being in possession and the being out of possession of land, and which gave rise to the old saying that possession is nine points of the law. The effect of the statute is this, — that when a man is in possession he may use force to keep out a trespasser; but, if a trespasser has gained possession, the rightful owner cannot use force to put him out, but must appeal to the law for assistance. And the result of the cases appears to me to be this, that, inasmuch as the possession of the defendant was unlawful, he can recover no damages for the for-

cible entry of the plaintiff. He can recover no damages for the entry, because the possession was not legally his, and he can recover none for the force used in the entry, because, though the statute of Rich. 2 creates a crime, it gives no civil remedy. But, in respect of independent wrongful acts which are done in the course of or after the forcible entry, a right of action does arise, because the person doing them cannot allege that the acts were lawful, unless justified by a lawful entry; and he cannot plead that he has a lawful possession. This, as it appears to me, is the result of the cases. The leading authority on the subject is *Newton v. Harland*, a case in which a great difference of opinion was evinced between the learned judges before whom it came. It was tried three times, first before Baron Parke, secondly before Baron Alderson, and thirdly before Mr. Justice Coltman, and came three times before the Court of Common Pleas in Banc, and it must, in my judgment, be taken as having settled the law on the subject. The action was brought to recover damages for an assault committed on the plaintiff's wife in the course of a forcible entry by the defendant into some apartments which had been occupied by the plaintiff as tenant to the defendant. The plaintiff remained in the apartments after the expiration of his term, and the defendant entered by force and turned out the plaintiff's wife and family, and in so doing assaulted the wife. The defendant pleaded that the acts were done in defence of his possession of the house, and the Court of Common Pleas held, contrary to the opinions of Baron Parke and Baron Alderson, that the defence failed, because the defendant's entry was unlawful. On the other hand, when the cause of action alleged is simply the eviction, no damages can be recovered. That is the result of *Pollen v. Brewer*,¹ and it is also clear from other cases. No doubt, in *Harvey v. Brydges*,² Baron Parke and Baron Alderson expressed their disapproval of *Newton v. Harland*; but they were the judges who had tried that case, and whose opinions had been overruled by the court in Banc. In *Davison v. Wilson*³—an action for eviction—it was held that the averments in the declaration "with force and arms, with a strong hand, and against the form of the statute," were, on the pleadings, allegations of matter of aggravation only, and not of a separate cause of action, and therefore the plea of *liberum tenementum* prevailed. The case of *Meriton v. Coombes*,⁴ in my opinion, supports the same view. The only other case to which it is necessary for me to refer is *Lows v. Telford*.⁵ There the action was brought for a malicious prosecution. The defendant, who was the mortgagee in fee of certain premises which the plaintiffs had been allowed by the mortgagor to occupy, entered into actual possession of the premises by forcing the lock of the outer door in the absence of the occupiers. The plaintiffs then entered by force and ejected the defendant. The defendant indicted them for a forcible entry, and they were

¹ 7 C. B. N. S. 371.² 14 M. & W. 437.³ 11 Q. B. 890.⁴ 9 C. B. 787.⁵ 1 App. Cas. 414.

acquitted. They then brought the action against the defendant for a malicious prosecution. It was held by the House of Lords that they could not sustain the action, on the ground that there was reasonable cause for the indictment, because the statute makes a forcible entry equally unlawful, whether the person in possession is or is not the lawful owner of the property. I think that none of those cases in any way countervail *Newton v. Harland*, which I take to have established this, that there is a good cause of action whenever in the course of a forcible entry there has been committed by the person who has entered forcibly an independent wrong, some act which can be justified only if he was in lawful possession. I come, therefore, to the conclusion that, in respect of his claim for damages for the forcible entry and eviction, the defendant cannot succeed, but that, in respect of his claim for damages for the injury done to his furniture, which the plaintiff could only justify by a lawful possession, the defendant is entitled to succeed. I shall refer it to Chambers to ascertain the amount of the damages. With regard to the costs, I have already dismissed the rest of the counter-claim, and I am giving the defendant only a very small portion of the relief which he asked. I must either apportion the costs of the counter-claim, or I must give the relief without costs. I think the latter course the preferable one.¹

ELLEN B. LOW v. ZENO P. ELWELL AND WIFE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOV. 29, 1876.

[Reported in 121 *Massachusetts Reports*, 309.]

GRAY, C. J.² A tenant holding over after the expiration of his tenancy is a mere tenant at sufferance, having no right of possession against his landlord. If the landlord forcibly enters and expels him, the landlord may be indicted for the forcible entry. But he is not liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary. The tenant cannot maintain an action in the nature of trespass *quare clausum fregit*, because the title and the lawful right to the possession are in the landlord, and the tenant, as against him, has no right of occupation whatever. He cannot maintain an action, in the nature of trespass to his person, for a subsequent expulsion with no more force than necessary to accomplish the purpose; because the landlord, having obtained possession by an act which, though subject to be punished by the public as a breach of the peace, is not one of which the tenant has any right to complain, has, as

¹ *Millar v. Long*, 75 *Law Times*, 428 *Accord.* — ED.

² Only the opinion of the court is given. — ED.

against the tenant, the right of possession of the premises; and the landlord, not being liable to the tenant in an action of tort for the principal act of entry upon the land, cannot be liable to an action for the incidental act of expulsion, which the landlord, merely because of the tenant's own unlawful resistance, has been obliged to resort to in order to make his entry effectual. To hold otherwise would enable a person, occupying land utterly without right, to keep out the lawful owner until the end of a suit by the latter to recover the possession to which he is legally entitled.

This view of the law, notwithstanding some inconsistent opinions, is in accordance with the current of recent decisions in England and in this Commonwealth.

In *Turner v. Meymott*¹ it was decided that a tenant whose term had expired could not maintain trespass against his landlord for forcibly breaking and entering the house in his absence. In *Hillary v. Gay*,² indeed, Lord Lyndhurst at *nisi prius*, while recognizing the authority of that decision, ruled that if the landlord, after the expiration of the tenancy, by force put the tenant's wife and furniture into the street, he was liable to an action of trespass *quare clausum fregit*. And in *Newton v. Harland*, a majority of the Court of Common Pleas, overruling decisions of Baron Parke and Baron Alderson at *nisi prius*, held that under such circumstances the landlord was liable to an action of trespass for assault and battery.

But in *Harvey v. Brydges*,³ Baron Parke stated his opinion, upon the point raised in *Newton v. Harland*, as follows: "Where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the other party. I cannot see how it is possible to doubt that it is a perfectly good justification to say that the plaintiff was in possession of the land against the will of the defendant, who was owner, and that he entered upon it accordingly; even though, in so doing, a breach of the peace was committed." Baron Alderson concurred, and said that he retained the opinion that he expressed in *Newton v. Harland*, notwithstanding the decision of the majority of the Court of Common Pleas to the contrary. The opinion thus deliberately adhered to and positively declared by those two eminent judges, though not required by the adjudication in *Harvey v. Brydges*, is of much weight. In *Davis v. Burrell*⁴ Mr. Justice Cresswell said, that the doctrine of *Newton v. Harland* had been very much questioned. And it was finally overruled in *Blades v. Higgs*,⁵ where, in an action for an assault by forcibly taking the defendant's property from the plaintiff's hands, using no more force than was necessary, Chief Justice Erle, delivering the unanimous judgment of the

¹ 7 Moore, 574; s. c. 1 Bing. 158.

² 6 C. & P. 284.

³ 14 M. & W. 437.

⁴ 10 C. B. 821, 825.

⁵ 10 C. B. (N. S.) 713.

court, approved the statement of Baron Parke, above quoted, and added: "In our opinion, all that is so said of the right of property in land applies in principle to a right of property in a chattel, and supports the present justification. If the owner was compelled by law to seek redress by action for a violation of his right of property, the remedy would be often worse than the mischief, and the law would aggravate the injury, instead of redressing it." See also *Lows v. Telford*.¹

In *Commonwealth v. Haley*² the case was upon an indictment for forcible entry, and no opinion was required or expressed as to the landlord's liability to a civil action.

The judgment in *Sampson v. Henry*³ turned upon a question of pleading. The declaration, which was in trespass for an assault and battery, alleged that the defendant assaulted the plaintiff, and with a deadly weapon struck him many heavy and dangerous blows. The pleas of justification merely averred that the defendant was seised and had the right of possession of a dwelling-house, that the plaintiff was unlawfully in possession thereof, and forcibly opposed the defendant's entry, and that the defendant used no more force than was necessary to enable him to enter and to overcome the plaintiff's resistance; but did not deny the use of the dangerous weapon and the degree of violence alleged in the declaration; and were therefore held bad, in accordance with *Gregory v. Hill*,⁴ there cited. The remarks of Mr. Justice Wilde, denying the right of a party dispossessed to recover possession by force and by a breach of the peace, would, if construed by themselves, and extended beyond the case before him, allow the tenant to maintain an action of trespass against the landlord for entering the dwelling-house, in direct opposition to the judgment delivered by the same learned judge, in another case, between the same parties, argued at the same term and decided a year after. *Sampson v. Henry*.⁵

In the latter case, which was an action for breaking and entering the plaintiff's close, and for an assault and battery upon him, the court held that the plea of *liberum tenementum* was a good justification of the charge of breaking and entering the house, but not of the personal assault and battery. That decision, so far as it held that the landlord was not liable to an action of trespass *quare clausum fregit* by a tenant at sufferance for a forcible entry, has been repeatedly affirmed. *Meador v. Stone*; ⁶ *Miner v. Stevens*; ⁷ *Mason v. Holt*; ⁸ *Curtis v. Galvin*; ⁹ *Moore v. Mason*.¹⁰ And, so far as it allowed the plaintiff to recover, in such an action, damages for the incidental injury to him or to his personal property, it has been overruled. *Eames v. Prentice*; ¹¹ *Curtis v. Galvin*, *ubi supra*.

It has also been adjudged that a landlord, who, having peaceably

¹ 1 App. Cas. 414, 426.

⁴ 8 T. R. 299.

⁷ 1 Cush. 482, 485.

¹⁰ 1 Allen, 406.

² 4 Allen, 318.

⁵ 13 Pick. 36.

⁸ 1 Allen, 45.

¹¹ 8 Cush. 337.

³ 11 Pick. 379.

⁶ 7 Met. 147.

⁹ 1 Allen, 215.

entered after the termination of the tenancy, proceeds, against the tenant's opposition, to take out the windows of the house, or to forcibly eject the tenant, is not liable to an action for an assault, if he uses no more force than is necessary for the purpose. *Mugford v. Richardson*; ¹ *Winter v. Stevens*.² For the reasons already stated, we are all of opinion that a person who has ceased to be a tenant, or to have any lawful occupancy, has no greater right of action when the force exerted against his person is contemporaneous with the landlord's forcible entry upon the premises.

Our conclusion is supported by the American cases of the greatest weight. *Jackson v. Farmer*; ³ *Overdeer v. Lewis*; ⁴ *Kellam v. Janson*; ⁵ *Stearns v. Sampson*; ⁶ *Sterling v. Warden*.⁷ The opposing decisions are so critically and satisfactorily examined in an elaborate article upon this subject in 4 *Am. Law Rev.* 429, that it would be superfluous to refer to them particularly.

The tenancy of the plaintiff's husband under an oral lease was but a tenancy at will, which, by the written lease from his landlord to the defendant, and reasonable notice thereof, was determined, and he became a mere tenant at sufferance. *Pratt v. Farrar*.⁸ It being admitted that, if the defendants had the right to remove the plaintiffs by force, no more force was used than was reasonably necessary, this action cannot be maintained.

*Plaintiff nonsuit.*⁹

HARVEY v. MAYNE.

IN THE COMMON PLEAS, IRELAND, JANUARY 31, 1872.

[*Reported in Law Reports, 6 Common Law, 417.*]

ACTION for assault and false imprisonment. Second plea: That before and at the time of the alleged trespasses the plaintiff had wrongfully in his possession a certain chattel of the defendants, — that is to say, a certain check drawn by the defendants upon the Ulster Bank, — without the leave and against the will of the defendants; and the plaintiff was then in the office of the defendants, of his own will and accord, and by the license of the defendants, and was then about wrongfully and unlawfully to take and carry away the said check and convert it to his own use; and the defendants then required the plain-

¹ 6 Allen, 76.

⁴ 1 W. & S. 90.

⁷ 51 N. H. 217.

² 9 Allen, 526.

⁵ 17 Penn. St. 467.

⁸ 10 Allen, 519.

³ 9 Wend. 201.

⁶ 59 Maine, 568.

⁹ *Manning v. Brown*, 47 Md. 506, 512 (*semble*); *Coughlin v. Gray*, 131 Mass. 56; *Stone v. Lahey*, 133 Mass. 426; *Twombly v. Monroe*, 136 Mass. 464, 467 (but see *Sampson v. Henry*, 11 Pick. 379, 13 Pick. 36; *Churchill v. Hulbert*, 110 Mass. 426); *Sterling v. Warden*, 51 N. H. 217, 236; *Souter v. Codman*, 14 R. I. 119; *Allen v. Kelly* (R. I. 1892), 24 Atl. R. 776 *Accord*. — Ed.

tiff to refrain from carrying away and converting the said check, and to give up the possession thereof to the defendants, which the plaintiff then refused to do, and thereupon the defendants gently laid hands on the plaintiff, and detained him in the said office of the defendants, in order to prevent his carrying away and converting the said check as aforesaid, and not otherwise; doing no more, and detaining the plaintiff no longer, than was necessary, which are the alleged trespasses.

Demurrer.

Kisbey (with him *H. Law*, Q. C.), in support of demurrer.

Mulholland, contra.¹

Cur. adv. vult.

The judgment of the court was pronounced by

MORRIS, J. The plea demurred to does not allege that the acts complained of were done for the purpose of retaking the defendants' goods. It has been argued that such an allegation should be intended, and, for the purposes of this decision, we shall assume that the plea contains it by implication.

The first case in which such a defence appears to have been pleaded to an action for imprisonment is *Chambers v. Miller and others*.² The plaintiff took issue on the plea; and the question at the trial appears to have been, whether the goods which the plaintiff endeavored to take away were, at the time of the commission of the acts complained of, the property of the plaintiff or of the defendants. A verdict having been found for the plaintiff, the case came before the Court of Common Pleas,³ on a motion to enter a verdict for the defendants. The only question reserved for the consideration of the court was, whether, under the peculiar circumstances of the case, the property in the goods had passed to the plaintiff? And the legal validity of the defence did not come into question. In a very learned note to the report of the case in *Foster and Finlayson*, vol. iii. pp. 202 *et seq.*, the reporter points out that there is no authority for such a defence. *Blades v. Higgs* shows that the owner of goods, which are wrongfully in the possession of another, may justify an assault involving no unnecessary violence, in order to repossess himself of his property; but there is nothing in that case to justify the extension of the principle on which it was decided to an imprisonment and detention for an indefinite time. The demurrer must, therefore, be allowed, with costs.

*Demurrer allowed.*⁴

¹ The arguments of counsel are omitted. — Ed.

² 3 F. & F. 202.

³ 13 C. B. N. S. 125.

⁴ See *Hudson v. Slade*, 3 F. & F. 390; *Davis v. Whitridge*, 2 Strob. 232. — Ed.

BEATTIE v. MAIR.

IN THE EXCHEQUER DIVISION, IRELAND, MAY 12, 1882.

[*Reported in Law Reports, 10 Irish, 208.*]

PALLES, C. B.¹ The question raised by the demurrer to the statement of defence is, whether an action can be maintained by a person who was in possession of lands, without title, against the true owner of the lands, for, with force and strong hand entering the land, expelling the plaintiff from the possession, and taking goods the property of the defendant, then being on the lands.

The statement of claim does not contain any allegation of assault. It is unnecessary, therefore, to consider whether *Newton v. Harland* is now law, or the effect (if any) on that decision of the *dicta* of Lord Wensleydale and Baron Alderson in *Harvey v. Brydges*² (apparently approved of by Lord Selborne in *Lows v. Telford*)³ and *Blades v. Higgs*.

However that may be, I think it clear, upon principle and authority, that a civil action cannot be maintained against the true owner by one wrongfully in possession, merely for expelling him by force and with a strong hand from his unlawful possession. No doubt such expulsion is rendered wrongful by our statute 10 Car. 1, sess. 3, c. 13 (similar to 21 Jac. 1, c. 15, England); but the prohibition contained in the statute is clearly one for the public generally; and according to the ordinary rule of construction, the remedy given by such a statute is a remedy by indictment, unless a particular individual has sustained some special damage, some particular injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects by the infringement of the law. I am clearly of opinion that eviction by the true owner from the possession of lands in which the plaintiff is in wrongful possession cannot be either general or special damage. So much for the question of principle. As to authority, *Pollen v. Brewer*⁴ seems to me to be precisely in point. No doubt there the fourth count, on which the question arose, was in trespass for breaking and entry; and there was neither a special count in the form adopted in the present case, or a replication relying upon the force; but the decision, that damages for the expulsion were not recoverable, is equally in point in an action upon the statute, where, as I conceive, the plaintiff is bound to show special and peculiar damage.

For the same reason, the taking of the goods cannot amount to special damage, as they are shown to have been the defendant's own goods. Whilst *Beddall v. Maitland* is a direct authority against the

¹ Only a portion of the opinion of the court is given. — Ed.

² 14 W. & M., at p. 442.

³ 1 App. Cas., at p. 426.

⁴ 7 C. B. N. S. 371.

claim of the plaintiff here, in respect of the eviction it is not in point in his favor as to the taking of the goods, as there the furniture in respect of which damages were given were the plaintiff's. *Edwick v. Hawkes*¹ does not apply, as there Mr. Justice Fry decided that the plaintiff's estate had not been determined.

FITZGERALD and DOWSE, BB., concurred.*

BURLING v. READ.

IN THE QUEEN'S BENCH, APRIL 20, 1850.

[Reported in 11 *Queen's Bench Reports*, 904.]

TRESPASS. The first count charged that defendants, on, &c., with force and arms and with a strong hand, broke and entered a workshop

¹ 18 Ch. Div. 190.

² *Pollen v. Brewer*, 7 C. B. N. S. 371; *Delany v. Fox*, 1 C. B. N. S. 174, 179; *Tribble v. Frame*, 7 J. J. Marsh. 604; *Manning v. Brown*, 47 Md. 506; *Sampson v. Henry*, 13 Pick. 36; *Meador v. Stone*, 7 Met. 147; *Curtis v. Galvin*, 1 All. 215; *Mugford v. Richardson*, 6 All. 76; *Merriam v. Willis*, 10 All. 118; *Fuhr v. Dean*, 26 Mo. 116; *Harris v. Gillingham*, 6 N. H. 11; *Sterling v. Warden*, 51 N. H. 217, 222; *State v. Morgan*, 59 N. H. 322; *Todd v. Jackson*, 2 Dutch. 525; *Wilde v. Cantillon*, 1 Johns. Cas. 123; *M'Dougall v. Sitcher*, 1 Johns. 42; *Hyatt v. Wood*, 4 Johns. 150; *Ives v. Ives*, 13 Johns. 235; *Jackson v. Seelye*, 16 Johns. 197; *Jackson v. Farmer*, 9 Wend. 201; *Bliss v. Johnson*, 73 N. Y. 529 (*semble*); *Walton v. File*, 1 Dev. & Bat. 567; *Barnes v. Dean*, 5 Watts. 548; *Kellam v. Johnson*, 17 Pa. 467; *Adams v. Adams*, 7 Phila. 160; *Muldrow v. Jones*, Rice (S. Car.) 64; *Johnson v. Hannahan*, 1 Strob. 313; *Simmons v. Parsons*, 1 Bail (S. Car.) 62; *Myers v. Myers*, 1 Bail. (S. Car.) 306; *Rush v. Aiken Ca.*, 58 S. Ca. 145 (repudiating certain dicta to the contrary in earlier S. Ca. cases); *Roberts v. Tarver*, 1 Lea, 441; *Beecher v. Parmele*, 9 Vt. 352 *Accord*.

Larkin v. Avery, 23 Conn. 304; *Entelman v. Hagood*, 95 Ga. 390; *Moseley v. Rambo*, 106 Ga. 597; *Raymond v. Strickland*, 124 Ga. 504; *Baker v. Hays*, 28 Ill. 387; *Shoudy v. School Directors*, 32 Ill. 290; *Page v. DePuy*, 40 Ill. 506; *Reeder v. Purdy*, 41 Ill. 279; *Wilder v. House*, 48 Ill. 279; *Farwell v. Warren*, 51 Ill. 467; *Comstock v. Brosseau*, 65 Ill. 39; *Haskins v. Haskins*, 67 Ill. 446; *Illinois Co. v. Cobb*, 68 Ill. 53, 94 Ill. 55; *Dearlove v. Harrington*, 70 Ill. 251; *Doty v. Burdock*, 83 Ill. 473; *Fort Dearborn v. Klein*, 115 Ill. 177 (*semble*); *Wescott v. Arbuckle*, 12 Ill. Ap. 577; *M'Donald v. Lightfoot*, *Morris* (Iowa), 450; *Moore v. Boyd*, 24 Me. 242; *Brook v. Berry*, 31 Me. 293 (see *Stearns v. Sampson*, 59 Me. 568); *Emerson v. Sturgeon*, 59 Mo. 404; *Mosseller v. Deaver*, 106 N. Ca. 494; *Overdeer v. Lewis*, 1 W. & S. 90; *Frick v. Fiscus*, 164 Pa. 623, 627; *Dustin v. Cowdry*, 23 Vt. 631; *Whittaker v. Perry*, 38 Vt. 107 *Contra*.

A fortiori where there is no personal violence to the wrongful possessor by the forcible entry of the true owner, as where the entry is made during the temporary absence of the possessor, the latter cannot maintain trespass *quare clausum fregit*. *Turner v. Meymott*, 1 Bing. 158; *Hoffman v. Harrington*, 22 Mich. 52; *Stearon v. Wooldrich*, 18 Minn. 354; *Todd v. Jackson*, 2 Dutch. 525; *Roberts v. Preston*, 106 N. Ca. 411; *Freeman v. Wilson*, 16 R. I. 524; *Mussey v. Scott*, 32 Vt. 82. But see, *contra*, *Mason v. Hawes*, 52 Conn. 12. — Ed.

of plaintiff, in which plaintiff was, at the said several days, &c., inhabiting and actually present, and then while the plaintiff was actually present in the said workshop, pulled it down, and destroyed it, &c.

Pleas. Fourth.¹ Except so far as the same charges defendants with having committed the supposed trespasses with a strong hand, and whilst plaintiff was inhabiting the said workshop, and actually present: that, before and at the said several times when, &c., defendants, W. Pate the elder and W. Pate the younger, were the churchwardens, and James Rose and Jonathan Tyson were the overseers of the poor, of the said parish of Haddenham, duly appointed; and that the said workshop, at the several times when, &c., was the workshop, soil, and freehold of the said churchwardens and overseers: wherefore defendants W. Pate the elder and W. Pate the younger, as such churchwardens in their own right, and Read, R. Pate, and W. M. Pate, as the servants of the said churchwardens and overseers and by their command, at the several times when, &c., broke, &c.: justifying the breaking and entering the workshop, making a noise, &c., breaking, &c., the chimneys, &c., and pulling down, &c., the workshop, and seizing, &c., the materials, &c., and removing the goods and chattels as encumbering, &c.: verification. Replication: that the workshop was not the workshop, soil, and freehold of the churchwardens, &c., or any or either, &c.: conclusion to the country. Issue thereon.

On the trial, before Pollock, C. B., at the last Cambridgeshire assizes, evidence was given, for the plaintiff, to show that he had built the workshop, and that the defendants entered and took possession of it, and pulled it down, while the plaintiff was in it; and for the defendants, to show that the parish officers were legally entitled to the soil under stat. 59 Geo. III. c. 12, § 17. The Lord Chief Baron told the jury that, if they were satisfied that the plaintiff had no right to the possession of the workshop, and the parish officers had title to it, they were entitled to take immediate possession, and, when so in possession, to pull the workshop down; and that in that case the fourth issue, so far as regarded the workshop and all affixed to the freehold, must be found for the defendants;² for that, as to that issue, it was immaterial whether, at the time of the act complained of, the plaintiff was or was not in the house. The jury found for the defendants on the fourth issue.

Prendergast now moved for a new trial, on the ground of misdirection.

LORD CAMPBELL, C. J. I think the direction was quite right, though there is on the record the immaterial allegation of the plaintiff being actually in the workshop. The plaintiff is a trespasser: what right can he have to prevent the owner of the soil from pulling down the

¹ Only what relates to this plea is given. The argument for the defendant is also omitted.

² See *Jones v. Chapman*, 2 Exch. 803.

house? I pronounce no opinion against the decision in *Perry v. Fitzhowe*; ¹ I assume it to be right; but that case is clearly distinguishable from this, where the house is not the dwelling-house of the plaintiff, and where the act complained of is the act not of a commoner who seeks to abate a nuisance, but of the owner of the house. It would be giving a most dangerous extension to the doctrine in *Perry v. Fitzhowe* (assuming the decision there to be correct), if we were to hold that the owner of a house could not exercise the right of pulling it down, because a trespasser was in it.

PATTESON, J. In *Perry v. Fitzhowe* the action was brought by the owner of the house, who was in it at the time of its being destroyed; and the justification set up was by a person entitled to common on the land where the house was built, who made no claim to title in the house: and we held that the commoner could not assert his right of common by knocking a house about the ears of the owner. There was no pretence that the house was not the house of the plaintiff. But here the defendants say that the plaintiff is a mere stranger, and the jury so find. It never can be that a mere stranger acquires a title by intrusion, except in the time prescribed by the Statutes of Limitation. The inhabiting makes no difference: it cannot prevent the owner of a house from doing what he likes with it. The plaintiff here has no right at all. In *Perry v. Fitzhowe* he had the right to the possession. That case seems to have led to a mode of declaring under circumstances to which the decision is inapplicable. It seems to be now the fashion, in all cases of trespass to a house, to say that the trespass was committed while the plaintiff was in it.

WIGHTMAN, J. I agree, and for the reasons given by my Lord and my brother Patteson.

ERLE, J. It is very important that the distinction between *Perry v. Fitzhowe* and such a case as this, pointed out by my Lord and my brother Patteson, should be understood. Otherwise parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut, and occupying it before morning. It should be made known that that is a misapprehension of the effect of *Perry v. Fitzhowe*.

Rule refused.

EDWARD C. MILLS v. JOSIAH F. WOOTERS.

IN THE SUPREME COURT, ILLINOIS, JUNE, 1871.

[*Reported in 59 Illinois Reports, 234.*]

PER CURIAM. Appellant brought an action of trespass, for the forcible taking of a cow.

The facts are, briefly: that the cow, at the time of the alleged taking, was in the possession of a third party; that appellant had sold

¹ 8 Q. B. 757.

her to one Oliver for \$35, and had received in payment \$29, and that appellee had purchased her of Oliver and paid for her, and in a conversation between the parties, appellant said, he had sold her to Oliver, and that appellee might take her.

It is contended, in argument, that the alleged trespass was an outrageous invasion of the rights of the citizen. The language of appellee, at the time he took the cow, was reprehensible. He, and those with him, may have been guilty of a riot. A breach of the peace may have been committed.

All this would not constitute trespass in the taking of the property. Consent was given for that, and then the payment was made to Oliver. The property then belonged to appellee. He was the owner, and had the right to use sufficient force to obtain possession. He was not, however, justified in committing an assault, or a breach of the peace.

After the agreement between the parties it would be manifestly unjust, and in violation of every principle of law and right, to permit appellant to retain the cow. He must abide by his promise fairly made.

The judgment must be affirmed.

*Judgment affirmed.*¹

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1466.

[Reported in Year-Book, 6 Edward IV., folio 7, placitum 18.]

A MAN brought a writ of trespass *quare vi et armis clausum fregit, etc., et herbam suam pedibus conculcando consumpsit*, and supposed the trespass in five acres; and the defendant says, as to the coming, &c., and as to the trespass in the five acres, not guilty; and as to the trespass in the five acres, *actio non*; for he says that he himself has an acre of land upon which a thorn-hedge is growing, adjoining the said five acres, and the defendant, at the time of the trespass alleged, came and cut the thorns, and they, *ipso invito, cecidere* on the said acres of the plaintiff, and the defendant went quickly upon the said acres, &c., and took them, which is the same trespass for which he has conceived his action, &c.; and upon this they demurred, &c., and it was well argued and adjourned. And now *Catesby* says: Sir, it has been said that if one does an act, though lawful, whereby wrong and damage is done to another against his will, still if he in any way could have avoided it, &c., then he shall be punished therefor, &c. Sir, it seems to me the other way; and as I understand it, if one does a lawful act whereby damage comes to another against his will, he shall not be punished at all, &c. As if I drive my cattle along the highway,

¹ *Hyatt v. Wood*, 4 Johns. 150, 158 (*semble*); *Scribner v. Beach*, 4 Den. 448, 451; *Spencer v. McGowen*, 13 Wend. 256; *Hurd v. West*, 7 Cow. 752; *Hite v. Long*, 6 Rand. 457; *Taylor v. Welby*, 36 Wis. 42 *Accord.* — Ed.

and you have an acre of ground adjoining, and my cattle enter upon your land and eat your grass, and I come freshly and drive them out: in this case you shall have no action against me, because then it was lawful to drive them out, and their entry upon the land was against my will; and no more here, for the cutting was lawful, and the falling upon your land was against my will, therefore the retaking was good and lawful, &c. And, sir, I put a case, that I am cutting my trees, and the boughs fall upon a man and kill him; in this case I shall not be attainted as of felony, for my cutting was lawful, and the falling upon the man was against my will, and no more here, &c. *Fairfax*. It seems to me just the other way, and I say that there is a diversity between an act resulting in a felony and one resulting in trespass, for in the case put by Catesby there was no felony, for felony is of malice prepense, and when it was against his will it was not *animo felonico*, &c., but if one is cutting trees, and the boughs fall on a man and wound him, in this case he shall have an action of trespass, &c.; and, also, sir, if one is shooting at butts, and his bow shakes in his hands, and kills a man, *ipso invito*, it is no felony, as has been said, &c.; but if he wounds one by shooting, he shall have a good action of trespass against him, and yet the shooting was lawful, &c., and the wrong which the other received was against his will, &c., and so here, &c.

Yonge. I think differently; and in such a case, where one has *damnum absque injuria*, in this case he shall have no action, for he has no wrong, and there is no reason for his recovering damages; and so it was here, when he went upon the land to get the thorns which had fallen, this entry was not tortious, for when he cut them, and they fell on the close, *ipso invito*, the property in them was in him, and therefore it was lawful for him to take them out of the close; therefore, notwithstanding the damage, no wrong was suffered, &c.

Brian. It seems to me the other way, and to my intent, when one does an act he is bound to act in such a way as not to prejudice others, &c. As if I am building a house, and a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action &c.; and yet the raising of the house was lawful, and the timber fell, *me invito*, &c. And so if one assaults me and I cannot escape, and I in self-defence lift my stick to strike him, and in lifting it hit a man who is behind me, in this case he shall have an action against me, yet my act was lawful, and I hit him, *me invito*, &c.; and so here, &c.

LITTLETON, J. To the same intent, and if a man is damaged, he ought to be recompensed; and to my intent the case put by Catesby is not law, for if your cattle come on my land and eat my grass, notwithstanding you come freshly and drive them out, you ought to make amends for what your cattle have done, be it more or less. But if cattle stray upon a man's land, the lord cannot distrain them for rent because when a lord distrains for rent, he is to hold the distress till his rent is paid, and so he cannot in the case aforesaid, for if I will offer sufficient amends, I shall have my cattle again, &c.; and in a writ of

rescous of cattle taken *damage feasant*, it is a good plea for one to say that he tendered sufficient amends, &c.; and, sir, if this should be law, that he might enter and take the thorns, for the same reason, if he cut a large tree, he might come with his wagons and horses to carry the tree off, which is not reason, for perhaps he has corn or other crops growing, &c.; and no more here, for the law is all one in great things and small, &c., and so according to the quantity of the trespass he should have amends.

CHOKE, C. J. To the same intent, for when the principle was not lawful, that which depends upon it is not lawful; for when he cut the thorns and they fell on my land, this falling was not lawful, and therefore his coming to take them out was not lawful. As to what was said about their falling *ipso invito*, that is no plea, but he ought to show that he could not act in any other way, or that he did all that was in his power to keep them out, &c., or else he shall pay damages, &c. And, sir, if the thorns on a great tree had fallen on his land by force of the wind, in this case he might have come in to get them, because the falling was not his act, but by force of the wind, &c. 21 Hen. VII. fol. 28.

TAYLER v. FISHER.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1589.

[Reported in *Croke's Elizabeth*, 246.]

TRESPASS for breaking his house and taking away a corset and a pike of the plaintiff's. The defendant pleaded that, long time before the trespass supposed, J. Bamfield was seised of the said corset and pike as of his own goods remaining in the plaintiff's house, and that he sold them to the defendant; and thereupon he *tempore quo*, &c., came to the plaintiff's house and demanded them; and the wife of the plaintiff then and there (the plaintiff being absent) licensed him to enter into the house and take them; and he thereupon entered, &c., and took them, as it was lawful for him to do, &c. And upon this it was demurred. And, after divers motions, it was adjudged for the plaintiff that he should recover as to the entering into the house, but not as to the goods; for the goods being in the plaintiff's house, and it not appearing how they came there, viz., either as trespass or otherwise, he cannot of his own head enter; and the wife's license to enter into her husband's house is not good;¹ for she cannot give one authority to enter into her husband's house. But GAWDY, *contra*. For it may be intended the goods were there by the plaintiff's license, and then he might well enter and take them; but the three other judges *contra*. And it was adjudged for the plaintiff. *Vid.* 30 Edw. III. 12.

¹ Grim v. Robinson, 31 Neb. 540 *Contra*. See Holdingshaw v. Ray, Cro. El. 376; Winterbourne v. Morgan, 11 East, 408; Cutler v. Smith, 57 Ill. 251.—Ed.

CHAPMAN v. THUMBLETHORP.

IN THE QUEEN'S BENCH, TRINITY TERM, 1594.

[Reported in *Croke's Elizabeth*, 329.]

TRESPASS for breaking his close, *et quædam averia ibidem existentia cepit et asportavit*. The defendant pleads that the cattle were his own goods, and that J. S. took them by wrong, and put them in the plaintiff's close by his assent, for which, he finding them there, did take them, &c., as it was lawful, &c. And upon this plea it was demurred.

Pudzey argued for the plaintiff that the defendant could not enter into the plaintiff's close to fetch them out, except they were put there by the plaintiff's tort; and this plea doth amount to a general issue, for he cannot traverse the property of the goods.

But the court held it a good plea; for the plaintiff by his declaration doth not aver the property of the goods to be in him, but saith only *quædam averia*. And when the defendant's beasts are taken from him by wrong, and are not out of his possession by his own delivery, he may justify the taking of them in any place he finds them. And it was adjudged for the plaintiff.¹

HIGGINS v. ANDREWS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1618.

[Reported in 2 *Rolle's Abridgment*, 564.²]

If certain persons unknown come into my garden feloniously and tear up certain apple and pear trees, and carry them off to the house of J. S., and the common voice is that the said trees are in the house of J. S., still I cannot justify my entry into the said house to take the said trees, inasmuch as the taking away of these trees annexed to the freehold was not a felony, but only a trespass, and so the case is the same as if they had been taken by a trespasser and put into the said house. Therefore it would not be lawful for me to take them without being a trespasser by my entry. Adjudged on demurrer.³

¹ See *Cunningham v. Yeomans*, 7 S. C. R. (N. S. Wales) 149. — Ed.

² 2 *Rolle R.* 55 s. c. — Ed.

³ If goods taken feloniously by A. are put upon the plaintiff's land with the latter's consent, the owner of the goods may lawfully enter and retake them. *Cunningham v. Yeomans*, 7 S. C. R. (N. S. Wales) 149. See also *Toplady v. Stalve*, Sty. 165; *Webb v. Beavan*, 6 M. & G. 1055; *Simpson v. McCaffey*, 13 Oh. 508. — Ed.

POLLYES CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1620.

[Reported in *Godbolt*, 282.¹]

IN an action of trespass, it was agreed by the court: If two tenants in common be of lands upon which trees are growing, and one of them felleth the trees and layeth them upon his freehold, if the other entereth into the land and carrieth them away, an action of trespass *quare clausum fregit* lieth against him; because the taking away of the trees by the first was not wrongful, but that which he might well do by law: And yet the other tenant in common might have seized them before they were carried off from the land. But if a man do wrongfully take my goods, as a horse, &c., and putteth the same upon his land, I may enter into his land and seize my horse again; but if he put the goods into his house, in such case I cannot enter into his house and retake my goods; because every man's house is his castle, into which another man may not enter without special license.

ANTHONY v. HANEY.

IN THE COMMON PLEAS, JANUARY 25, 1832.

[Reported in 8 *Bingham*, 186.]

TRESPASS. The declaration stated that defendants, on the 8th of November, 1830, and on divers other days, &c., between that day and the commencement of the suit, broke and entered plaintiff's close at Much Haddon, in the county of Hertford, trampled upon, and consumed plaintiff's grass, then and there placed 5,000 bricks, &c., in and upon the said close, pulled down one barn, three out-houses, and three leantos of plaintiff, and carried away the materials of the said barn, out-houses, and leantos.

Plea: That before and at the said times when, &c., in the said first count mentioned, the defendant John Haney was the owner of and entitled unto a certain barn, three out-houses, and three leantos, and divers goods and chattels, to wit, 10,000 bricks, 10,000 tiles, 5,000 planks of wood, 5,000 joists, 5,000 ties, 5,000 girders, 5,000 pieces of wood, 5,000 loads of timber, and 1,000 weight of iron, of great value, to wit, of the value of £200, then respectively standing and being in and upon the said close of the said plaintiff, in which, &c.; wherefore the said defendant John Haney, in his own right, and James Haney and Joseph Harding, as the servants of the said John Haney, by his com-

¹ 2 Roll. Ab. 566, pl. 16, s. c. — Ed.

mand, at the said several times when, &c., in the said first count mentioned, entered into and upon the said close in which, &c., in order to pull down, remove, take, and carry away the said barn, out-houses, and leantos, and to take and carry away the said goods and chattels, and did then and there pull down the said barn, out-houses, and leantos, and did take and carry away the materials thereof, and the said goods and chattels, in the said carts, wagons, and other carriages drawn by the said cattle, from and out of the said close in which, &c., doing no unnecessary damage to the said plaintiff on the occasions aforesaid, as they lawfully might for the cause aforesaid, &c. Demurrer and joinder.

Stephen, Serjt., was to have argued in support of the demurrer, but the court called on

Bompas, Serjt., to support the plea.¹

TINDAL, C. J. The second plea in this case cannot be supported in law; and it is bad on a ground much short of that which has been argued to-day. The defendant Haney states, as the ground of his right for entering the plaintiff's close, that he was the owner of a certain barn, three out-houses, three leantos, and certain chattels standing and being on the plaintiff's close, and then goes on to justify the trespass in question. I cannot collect from this statement but that the barn, leantos, &c., were standing on the close in the ordinary acceptance of the term, that is, were affixed to the freehold; and the rather because the defendant admits that he dug up the soil of the plaintiff in order to remove the barn; in other words, that he entered the soil of another and broke it up to get what he claimed as his own. That would be to take the law into his own hands, and to render an action of ejectment unnecessary. If so, the plea, which is bad in part, is, under the common rule, bad for the whole, and judgment must be given for the plaintiff. But we are unwilling to decide the case on so narrow a ground; for even if the barn had not been affixed to the freehold, the defendant has shown on this plea no justification of his entering to take it away. In none of the cases referred to has the plea been allowed, except where the defendant has shown the circumstances under which his property was placed on the soil of another. Here the defendant has confined himself to the statement that they were there, without attempting to show how. To allow such a statement to be a justification for entering the soil of another, would be opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace. Let us examine two or three of the cases which have been cited on the part of the defendant. And first, that of fruit falling into the ground of another that falls under the head of an accident, for which the defendant is not responsible, and which he shows by his plea before he can make out a right to enter.² So in the case of a tree which is blown down, or through decay

¹ The argument for the defendant is omitted. — Ed.

² The owner of a tree may, while standing on his own land, gather the fruit from a branch overhanging his neighbor's premises; and he may justify a battery upon his

falls into the ground of a neighbor, the owner may enter and take it. But the distinction is taken by Latch, who says that if it had fallen in that direction from the owner's cutting it, he could not justify the entry. As to the cases where goods have been feloniously taken, and the owner pursues to obtain possession, the principle is laid down by Blackstone,¹ who says, "As the public peace is a superior consideration to any one man's private property, and as if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided that this natural right of recaption shall never be exerted where such exertion must occasion strife or bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen, but must have recourse to an action at law." A case has been suggested in which the owner might have no remedy where the occupier of the soil might refuse to deliver up the property, or to make any answer to the owner's demand; but a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such a case enter and take his property, subject to the payment of any damage he might commit.²

Judgment for plaintiff.³

PATRICK v. COLERICK.

IN THE EXCHEQUER, EASTER TERM, 1838.

[Reported in 3 Meeson & Welsby, 483.]

TRESPASS for breaking and entering the plaintiff's close, and with feet in walking, &c., and with horses, &c., and with the wheels of carts, &c., subverting the soil, and seizing and carrying away divers large quantities of straw, &c.

neighbor if the latter use force to prevent him from exercising his right. *Hoffman v. Armstrong*, 48 N. Y. 201, 46 Barb. 337. — Ed.

¹ 3 Comm. 4.

² The concurring opinions of PARK, BOSANQUET, and ALDERSON, JJ., are omitted. — Ed.

³ *Reed v. Smith*, Berton (N. B.) 173, (2d ed.) 288; *Zimmer v. Manning*, 2 S. C. R. C. L. (New South Wales) 235; *Herndon v. Bartlett*, 4 Porter, 481; *Bolling v. Whittle*, 37 Ala. 35; *Cutler v. Smith*, 57 Ill. 252; *Crocker v. Carson*, 33 Me. 436; *McLeod v. Jones*, 105 Mass. 403; *Heermance v. Vernoy*, 6 Johns. 5; *Blake v. Jerome*, 14 Johns. 406; *Newkirk v. Sabler*, 9 Barb. 652; *Blount v. Mitchell*, 1 Tay. (N. Car.) 131; *Chambers v. Bedell*, 2 Watts & S. 225; *Salisbury v. Green*, (R. I. 1892) 24 Atl. R. 787; *Roach v. Damron*, 2 Humph. 425 *Accord*.

Richardson v. Anthony, 12 Vt. 273; *Yale v. Seely*, 15 Vt. 221 *Contra*.

Compare Kallock v. Perry, 61 Me. 273; *Carpenter v. Halsey*, 60 Barb. 45. — Ed.

The defendant, in his third plea, alleged that the plaintiff had wrongfully taken the said straw from the defendant's possession and placed it upon the plaintiff's close; that the defendant made fresh pursuit after his straw, and then quietly and peaceably entered the said close, and with horses and wagons, in order to retake his said straw, and did then and there quietly and peaceably retake his said straw, and load the same upon the last-mentioned wagons, and carry the same away from and out of the said close in the said first count mentioned, in which, &c., as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff.

Demurrer, and joinder in demurrer.

F. V. Lee, in support of the demurrer.¹

PARKE, B. The passage in Blackstone, as to the right of recaption, applies to the case where the goods are placed on the ground of a third party. All the old authorities say, that where a party places the goods upon his own close, he gives to the owner of them an implied license to enter for the purpose of recaption. There are many authorities to that effect in Viner's Abridgment. Thus, in title Trespass, (1) a, it is said, "If a man takes my goods and carries them into his own land, I may justify my entry into the said land to take my goods again; for they came there by his own act." The reason of the judgment of the Court of Common Pleas is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it be shown that they came there by the plaintiff's act.

LORD ABINGER, C. B., BOLLAND, B., and ALDERSON, B., concurred.

*Judgment for the defendant.*²

¹ The argument for the plaintiff is omitted. — Ed.

² Y. B. 21 Hen. VI., fol. 30, pl. 15; Anon. Clayt. 64, pl. 111; Chase v. Jefferson, 1 Houst. 257; Wheelden v. Lowell, 50 Me. 499; Grim v. Robinson, 31 Neb. 540 (*semble*); Chambers v. Bedell, 2 Watts & S. 225; Graham v. Green, 5 All. (N. B.) 330; Murray v. McNeil, 1 W. N. (N. S. Wales) 136 *Accord*. — Ed.

SECTION VI. (*continued*).

(f) PRESERVATION OF LIFE, HEALTH, OR PROPERTY OF OTHERS.

FLETCHER v. FLETCHER.

IN THE QUEEN'S BENCH, JANUARY 18, 1859

[*Reported in 28 Law Journal Reports, Queen's Bench, 134.*]

DECLARATION for assaulting the plaintiff and giving him into custody, and causing him to be imprisoned for a long time in a lunatic asylum.

Fourth plea: that, before and at the time of the alleged imprisonment, the plaintiff had conducted himself as a person of unsound mind and incompetent to take and incapable of taking care of himself, and as a person proper to be taken charge of and detained under due care and treatment, and two medical certificates had been given by persons duly authorized in that behalf, and according to the provisions of the statute for the regulation of the care and treatment of lunatics, whereby it was certified that they had separately and personally examined the plaintiff, and that the plaintiff was a person of unsound mind, and a proper person to be taken charge of and detained under care and treatment; and the defendant had notice of the said several premises and certificates, and had reasonable and probable grounds for believing, and did in fact verily and *bona fide* believe, such certificates to be true, and that the plaintiff was a person of unsound mind and incompetent and incapable to take care of himself, and a person proper to be taken charge of and detained under due care and treatment as such, and that it was unfit and dangerous that he should be at large, and that it was necessary and proper for the plaintiff to be confined; and the defendant, being the uncle of the plaintiff, and a proper person to cause him to be taken in charge of and detained under care and treatment in that behalf, did, for the causes aforesaid, cause the plaintiff to be taken charge of and detained under due care and treatment as a person of unsound mind and incapable of taking charge of himself, and as a person proper to be taken charge of and detained according to the provisions of the statute.

Demurrer.

Lush, in support of the demurrer.

Bovill, contra.¹

LORD CAMPBELL, C. J. It is clear that, on this plea, we are bound to give judgment for the plaintiff. My brother Crompton informs us that when the plea was before him at Chambers he had great doubts about the propriety of giving the defendant leave to plead it; but it is as well that such a matter, though perhaps clear, should be judicially

¹ The arguments of counsel are omitted. — ED.

decided. By the common law of England it is only a person of unsound mind and dangerous to himself or others that may be restrained of his liberty by another. Such is taken to be law from the case in Bro. Abr. down to the last case on the subject. Mr. Bovill has gravely contended that the plea showed that the plaintiff pretended to be a madman expressly that he might be shut up in an asylum; for that is what his argument amounted to. But no such meaning can be put upon it: it merely states that he acted as a person of unsound mind. Then, shall it be said that the fact of any person acting so as to appear of an unsound mind is to be a justification for another locking him up as a lunatic? It would be most dangerous to the liberty of the subject if such a doctrine were to prevail. *Ira furor brevis est*; and there are many persons of eccentric habits, but still entirely in possession of their faculties, as we know from cases of contested wills, yet they may be said to be of unsound mind; and it would be monstrous to say that, because some persons chose to suppose they were lunatics, they might be locked up as such. The plea goes on to allege that a certificate of two physicians had been obtained. But where is the authority at common law for saying that if one or two men, physicians, if you will, say that another is a lunatic, that will justify a third person in taking him and confining him as a lunatic? On the other hand, the statute, instead of being of any service to the defendant, affords an argument against him; for the protection given by it to persons acting under certain circumstances in pursuance of it in regard to alleged lunatics would be unnecessary if the merely acting as a person of unsound mind would be sufficient to justify another in arresting him; for it shows that the legislature supposed that at common law such person would not be protected.¹

*Judgment for the plaintiff.*²

¹ The concurring opinions of WIGHTMAN, CROMPTON, and HILL, JJ., are omitted. — Ed.

² Y. B. Lib. Ass. fol. 98, pl. 56 (*semble*); Y. B. 22, Ed. iv. fol. 45, pl. 10; *Re Oakes*, 117 Law Reporter, 122; *Look v. Dean*, 108 Mass. 116; *Kelleher v. Putnam*, 60 N. H. 30; *Winchman v. Ritchie*, Bright N. P. 143 *Accord*.

One who properly deprives a dangerous lunatic of his liberty must with all reasonable speed give him in charge of his friends or the proper official. He may not detain him till he becomes harmless, *Colby v. Jackson*, 12 N. H. 526, nor take him to a police-station, unless he knows of no other place. *Paetz v. Dain*, 1 Wils. Sup'r Ct. (Ind.) 148.

To arouse a man from a drunken stupor, and to try to assist him on his journey, as a friendly act, and without negligence, gives no cause of action, even though the drunken man is injured in the course of such assistance. *Hoffman v. Eppers*, 41 Wis. 251. — Ed.

ANONYMOUS.

— HILARY TERM, 1469.

[*Reported in Year-Book, 9 Edward IV., folio 23, placitum 41.*]

TRESPASS was brought for injury to one's grass ; the defendant said that, by a custom of the county of Kent, whenever enemies came upon the coast, &c., it was lawful for all the men of Kent to come upon the land adjoining the shore, and to make trenches and bulwarks, for the defence and safeguard of the country ; and the defendant said that at the time of the said trespass enemies came, &c., and so justified. *Genney*. And I believe it is common law that a man may come upon my land to defend the kingdom, &c.¹ *Catesby*. No, sir : if it has not been customary, they cannot dig in my land, &c., *quære*, &c.

DEWEY v. WHITE AND OTHERS.

AT NISI PRIUS, BEFORE BEST, C. J., FEBRUARY 16, 1827.

[*Reported in Moody & Malkin, 56.*]

THIS was an action of trespass for forcing and throwing a stack of chimneys upon the roof of the plaintiff's house, and damaging and injuring the same.

Pleas, not guilty ; and a justification in substance that the chimneys were part of a house of one J. C., adjoining a highway in the parish of St. Andrew's Holborn, and adjoining to the house of the plaintiff, and near to certain other houses ; and that the house of the said J. C. was then recently damaged and consumed by fire ; and the said chimneys were, by reason of the said fire, in a ruinous and dangerous state, and in great and immediate danger of falling in and upon the said highway, and in and upon the said other houses, and thereby of doing great bodily injury to, and destroying the lives of, His Majesty's subjects passing along the said highway, and inhabiting the said dwelling-houses ; and it thereby became necessary, for the safety of His Majesty's said subjects, immediately to remove the said chimneys ; whereupon the said defendants did remove and throw down the said chimneys, and thereby did unavoidably damage the house of the said plaintiff. Replication, *de injuria*, &c., and issue thereon.

¹ Saltpetre Case, 12 Rep. 12 ; *Respublica v. Sparhawk*, 1 Dall. 357, 363 *Accord*. The destruction of property as a war measure gives the owner no remedy. *Ford v. Surget*, 97 U. S. 594, 46 Miss. 130 ; *United States v. Pacific Co.*, 120 U. S. 227, 233, 234. — ED.

The defendants were firemen belonging to the British Fire Office, and the houses of J. C. and of the defendant adjoined a frequented thoroughfare for foot passengers in Holborn.

Upon the plaintiff's counsel contending that the plea, if made out, was no defence to the action,

BEST, C. J., said, That question is upon the record; but I have no hesitation in declaring my opinion now, that the plea, if made out, is a good answer to the action. In analogy to the doctrine of nuisances, and the cases of captains of ships throwing overboard the cargoes to save the lives of the crews, I think it was the duty and right of these defendants to remove these chimneys, and to prevent their remaining to endanger the lives of His Majesty's subjects.

The trial proceeded, and the defendants obtained a verdict, in which the plaintiff acquiesced.¹

Taddy, Serjt., and *D. Pollock*, for the plaintiff.

Vaughan, Serjt., and *Brodrick*, for the defendant.

PASCAL SUROCCO AND ANOTHER v. JOHN W. GEARY.

IN THE SUPREME COURT, CALIFORNIA, JANUARY, 1853.

[Reported in 3 *California Reports*, 69.]

MURRAY, Chief Justice, delivered the opinion of the court. HEYDENFELDT, Justice, concurred.²

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under

¹ *Fields v. Stokley*, 99 Pa. 306 *Accord.* — ED.

² Only the opinion of the court is given. — ED.

apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quoad jura privata*."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. See 1st Zabriskie, *American Print Works v. Lawrence*, and the cases there cited.

This principle has been familiarly recognized by the books from the time of the Saltpetre Case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of

saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons; but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The Legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen that the delay caused by the removal of the goods would render the destruction of the house useless.¹

¹ *Malever v. Spink*, Dy. 36, pl. 40; *Saltpetre Case*, 12 Rep. 13; *Governor v. Meredith*, 4 T. R. 797 (*semble*); *Newcomb v. Tisdale*, 62 Cal. 575; *Bishop v. Mayor*, 7 Ga. 200; *Conwell v. Imrie*, 2 Ind. 35; *Field v. Des Moines*, 39 Iowa, 575; *Taylor v. Plymouth*, 8 Met. 465 (*semble*); *McDonald v. Redwing*, 13 Minn. 38 (*semble*); *American Works v. Lawrence*, 1 Zab. 248, 728, 2 Zab. 9, 590; *Mayor v. Lord*, 17 Wend. 290, 297, 18 Wend. 129; *City Co. v. Corlies*, 21 Wend. 367, 371; *Stone v. Mayor*, 25 Wend. 157, 174; *Russell v. Mayor*, 2 Den. 461; *Respublica v. Sparhawk*, 1 Dall. 357, 363 (*semble*); *Beach v. Trudgain*, 2 Grat. 219; *Harman v. Lynchburg*, 33 Grat. 37 *Accord*.

Reed v. Bias, 8 Watts & S. 109 *Contra*. Compare *Barrow v. Page*, 5 Hayw. 97.

"So if a fire be taken in a street, I may justify the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house, a city or town, and distressed, and to save my life I set fire on mine own house, which spreadeth and taketh hold upon other houses adjoining, this is not justifiable, but I am subject to their action upon the case, because I cannot rescue mine own life by doing any thing which is against the Commonwealth. But if it had been but a private trespass, as the going over another's ground, or the breaking of his inclosure when I am pursued, for the safeguard of my life, it is justifiable." — *BACON, Elements*, 32.

The removal of wall-paper infected with small-pox virus from the walls of a house gives no cause of action to the owner of the house. *Seavey v. Preble*, 64 Me. 120. See also *Louise Co. v. Yancey* (Va. 1909), 63 S. E. R. 452.

In *Beckwith v. Sturtevant*, 43 Conn. 158, it was decided that the defendant was not justified in putting a small-pox patient into the plaintiff's vacant house.

A dwellinghouse cut up into small apartments, inhabited by a crowd of poor people, in a filthy condition, and calculated to breed disease, may be torn down by individuals residing in the neighborhood, especially during the prevalence of a disease like Asiatic cholera. *Meeker v. Van Rensselaer*, 15 Wend. 397. — *ED.*

M. A. H. PROCTOR v. M. M. ADAMS AND OTHERS.
IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1873
[Reported in 113 Massachusetts Reports, 376.]

TORT, in the nature of trespass *quare clausum*, for entering the plaintiff's close and carrying away a boat.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth \$50, which they found lying there.¹

The defendants requested the court to rule that, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for \$51, and reported the case to this court.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3 Bl. Com. 106. *Chase v. Corcoran*.² Neither the finders of the boat, nor the owner of the beach, nor the Commonwealth, had any title to the boat as against its former owner. Body of Liberties, art. 90. Anc. Chart. 211; 2 Mass. Col. Rec. 143; St. 1814, c. 170; Rev. Sts. c. 57; Gen. Sts. c. 81; 3 Dane Ab. 134, 136, 138, 144; 2 Kent Com. 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him. *Sutton v. Buck*.³

If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. *Barker v. Bates*,⁴ *Dunwich v. Sterry*.⁵ But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of the common law, that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 H. VII. 27, 28, pl. 5; Bro. Ab. Trespass, 213; Vin. Ab. Trespass (H. a. 4), pl. 24 *ad fin.*; (K. a.) pl. 3.

¹ The rest of the statement of facts is omitted. — Ed.

² 106 Mass. 286, 288.

³ 2 Taunt. 302, 312.

⁴ 13 Pick. 255.

⁵ 1 B. & Ad. 831.

In *Dunwich v. Sterry*,¹ a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own and to put the plaintiffs to proof of their title. In *Barker v. Bates*,² upon which the plaintiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit.

*New trial ordered.*³

HUGH G. v. WILLIAM T.

IN THE KING'S BENCH, MICHAELMAS TERM, 1442.

[Reported in *Year-Book*, 21 *Henry VI.*, folio 14, placitum 29]

ONE Hugh G. brought a writ of trespass against W. T. *quare R., filium suum et hæredem apud Tregwoozam inventum rapuit et abduxit.*

Yelverton said that he delivered R. to the plaintiff within a fortnight after the supposed trespass, and that before the trespass supposed the plaintiff married Jane, sister of John Trevowith, and they had issue the said R., and then Jane died, Hugh then being out of the county; and because it was openly noised and proclaimed in the county that Hugh was dead, John, as uncle and next friend of R., ordered William, his servant, to go and see R., and if he found R. out of safe custody and badly looked after through default of his nurse, to take him and put him in better custody, to be better looked after; wherefore the said William found R., being one year old, greatly neglected by default of his nurse; and therefore William, as servant of John and by his command, took the said R. as he lawfully might. Judgment, if action &c. *Portington.* We ought to recover on his own showing, for John and William have no more to do with R. during the plaintiff's lifetime, than any stranger in the world.

PASTON, J. If William took the child to take care of him, when he was neglected, and delivered him to his father when he returned, what tort or damage is there? None; for if I find a child in the highway in danger of death, and take him to save him, and deliver him to his father, what tort is in me? None in the world. No more in the case at bar.

FULTHORPE, J. Your case is law. But here there is no lawful cause for William to take R. For suppose the father put him in charge of a nurse, who neglected him, is it lawful for John or William to take him from the nurse? *Non, certe*, for if she neglected the child, the father may have an action against her. . . .

¹ 1 B. & Ad. 831.

² 13 Pick. 255.

³ *Ploof v. Putnam* (Vt. 1908), 71 Atl. R. 188 (*semble*) *Accord.*

See *Milman v. Dolwell*, 2 Camp. 578; *Parker v. Barnard*, 135 Mass. 116, 117. — Ed.

FULTHORPE, J. Suppose you put your horse in a close, in which there is a quagmire, if your horse is mired, and is in danger of starving to death, if I pull him out of the mire, and take him home and feed him, and then give him back to you, there is no tort on my part, for you have no damage by my act.

NEWTON, C. J. Fulthorpe is right, and if you put a child in charge of a nurse and I find it on the point of being killed by a dog or a horse, and I take it to save it, and then give it to you, there is no tort on my part. Wherefore we all think the plea good, and the issue well joined.

ANONYMOUS.

IN THE COMMON PLEAS, TRINITY TERM, 1506.

[Reported in *Year-Book*, 21 *Henry VII.*, folio 27, *placitum* 5.]

In trespass, when the defendant justified because the corn for which the action, &c., was set apart as tithes, and was in danger of destruction by the cattle in the field, and thereupon the defendant took it to the barn of the plaintiff, who was parson of the vill. And to this plea the parson demurred in law.

Brudnel. The plea is not good; for when the corn was set apart and left on the land where it had grown, it was easy to take care of it, and in such case it is not lawful for any one to enter and take it. As where one takes my horse for fear that it will be carried away, this is not justifiable. And if his wife has lost her way and knows not where she is, still one shall not take her to his house unless she is in danger of being destroyed in the night or drowned. So here, although the corn was in the middle of the field, still it was by itself, and easy to take care of, and if any one takes it, I have my action against him. And so the bar is not good.

Palmes. We have alleged that it was in danger of destruction; and, had we not taken it, it certainly would have been destroyed, which is a sufficient and reasonable cause for us to justify the taking. As if I see my neighbor's chimney burning, to save the things within, I may justify an entry into the house and the taking of the things within to save them. And so because it is alleged that the goods were in danger, and that we took them to save them for the plaintiff, there is good reason for us to be excused. And so the bar is good.

KINGSMIL, J. When one's goods are taken against his will, the act should be justified as being necessary to the Commonwealth, or else by reason of a condition in law. First, as to the Commonwealth, one may justify the taking of goods from a house to save them, or tear down a house to save others. And so in time of war one may justify an entry upon another's land to make a bulwark in defence of the king

and the realm. And, on the other hand, when one distrains my horse for rent, he is justifiable, and this is because the land was bound by a condition of distress; and so of other conditions. And so in these two ways one may justify the taking of goods against the owner's will. But we are out of these cases here. For we are not in the case of the Commonwealth, nor of the condition. For though it is pleaded that the corn was in danger of destruction, still it was not in such danger but that the party should have his remedy. And if I have cattle *damage fesants*, I cannot justify an entry to drive them back, since I ought first to tender amends; therefore here, when the defendant took the corn, so that it should not be destroyed, still he was not justified. For if it had been destroyed, the plaintiff would have his remedy against the destroyer; and although he took it to the barn of the plaintiff, perhaps he used the barn for another purpose, and so no advantage shall be intended by this for the plaintiff, and so it seems the bar is not good.

REDE, C. J. Although the defendant's intention was good, still the intention is not material, but in felony it is; as where one is shooting at butts and kills a man, it is not felony. And so of a tiler on a house who with a stone kills a man unwittingly, it is no felony. But when one shooting at butts wounds a man unintentionally, he shall be called a trespasser against his will. And where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass. And the same law where my sheep are with other sheep. I can justify the chasing of the others, as well as my own, until I have driven them to a place where I can separate them. And in these cases there is reason, for in the first case one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger; and in the second case, they cannot be separated till they are driven to a pen. And where one justifies an imprisonment for suspicion of felony, one ought to have good grounds of suspicion, or he is not justifiable, as hue and cry; and if the cry is for nothing, then he who raised it shall be punished. So one ought always to have a good justification. As in trespass a license is a good justification. And so it is in evidence when the party has pleaded not guilty, for this excuses one for the entry, taking, or cutting at the time. But to return to the case here: when he took the corn, although it was a good deed with regard to the damage which a stranger's cattle might have caused, still it was not a good deed, nor any manner of justification against the owner, since the latter would have had an action against any one who might have destroyed the corn. As when my cattle are *damage fesants* in another's land, I cannot enter to drive them out; and still it is a good deed to drive them out, lest they do more damage. But it is otherwise when a stranger drives my horse into another's close, where it does damage: in such case I may justify an entry to drive it out, since the damage done was the fault of another. But here the defendant's act was not lawful. And it is not like the case where

things are in danger of destruction, as by water, fire, &c. For then there is a loss without remedy against any one ;¹ and so the plea is not good.

FISHER, J., was of the same opinion. *Quod nota.*

MOUSE'S CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1608.

[Reported in 12 Reports, 63]

IN an action of trespass brought by Mouse, for a casket and a hundred and thirteen pounds, taken and carried away, the case was : The ferryman of Gravesend took forty-seven passengers into his barge, to pass to London, and Mouse was one of them, and the barge being upon the water, a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger to be drowned, if a hogshead of wine and other ponderous things were not cast out for the safeguard of the lives of the men : it was resolved *per totam curiam*, that in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it ; for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*, to which the defendant pleads all this special matter ; and the plaintiff replies, *de injuria sua propria absque tali causa* : and the first day of this term this issue was tried, and it was proved directly that if the things had not been cast out of the barge, the passengers had been drowned ; and that *levandi causa* they were ejected, some by one passenger and some by another ; and upon this the plaintiff was nonsuit.

It was also resolved, that although the ferryman surcharge the barge yet for safety of the lives of passengers in such a time and accident of necessity, it is lawful for any passenger to cast the things out of the barge ; and the owners shall have their remedy upon the surcharge against the ferryman, for the fault was in him upon the surcharge : but if no surcharge was, but the danger accrued only by the act of God, as by tempest, no default being in the ferryman, every one ought to bear his loss for the safeguard and life of a man ; for interest *reipublice quod homines conserventur*, 8 Edw. IV. 23, &c. ; 12 Hen. VIII. 15 ; 28 Hen. VIII. ; Dyer, 36 ; plucking down of a house in time of fire, &c., and this *pro bono publico ; et conservatio vitæ hominis est bonum publicum*. So if a tempest arise in the sea, *levandi navis cause*, and for salvation of the lives of men, it may be lawful for passengers to cast over the merchandises, &c.²

¹ Y. B. 2 Rich. III. fol. 15, pl. 39 *ad finem Accord.*

See also Y. B. 9 Ed. IV. fol. 34 pl. 9, *per CHORKE, J. — ED.*

² *Plouf v. Putnam* (Vt. 1908) 71 Atl. R. 188 *Accord.* See *Price v. Hartshorn*, 44 N. Y. 94 ; *Jarvis v. Pinckney*, 3 Hill (S. Ca.), 123. Compare *Dabney v. N. E. Co.*, 14 All. 300. — ED.

KIRK, EXECUTOR, &c. v. GREGORY AND WIFE.

IN THE EXCHEQUER DIVISION, JANUARY 11, 1876.

[Reported in 1 *Exchequer Division*, 55.]

THE first count of the declaration alleged that the female defendant converted to her own use certain jewelry and diamond rings, the property of the plaintiff as executor.

The second count alleged a trespass by the female defendant, of the same goods.

Pleas: 1. Not guilty; 2. That the goods were not the goods of the plaintiff as executor. Issue thereon.

At the trial before *Bramwell*, B., in Middlesex, on the 11th of May, 1875, the following facts were proved. The plaintiff's testator died in July, 1874, in his own house while in a state of delirium tremens. His attendants and others were feasting and drinking in the house. The female defendant, who was the wife of the testator's brother, immediately after the death took out of an unlocked drawer in the room where the testator died some diamond rings and jewelry belonging to the testator, and (as she said) placed them with a watch of the testator's in a box, and put the box into a cupboard in another room for safety. The box and cupboard were unlocked. The plaintiff on being informed, found the watch, but the rings and jewelry were missing, and had never been found.

The learned judge ruled that there was no evidence of a conversion; but—the plaintiff's counsel insisting that he was entitled to a verdict on the count in trespass—left to the jury the question, whether the female defendant had put the things away *bona fide* for the purpose of preserving them? The jury answered the question in the affirmative, and the learned judge thereupon directed the verdict to be entered for the defendants, giving leave to the plaintiff to move to enter the verdict for him for 1s. damages on the count in trespass; the defendants to have liberty to add any plea of justification which the facts would support; neither party to appeal from the decision of the court.

A rule *nisi* having been obtained for a new trial on the ground of misdirection, in that the learned judge ought to have asked the jury not only whether Mrs. Gregory put the rings into the cupboard for their preservation, but also whether it was reasonable for her to do so, and whether it was negligent; or to enter a verdict for the plaintiff for 1s., pursuant to leave reserved, if the court should be of opinion that on the facts proved the plaintiff was entitled to a verdict on the trespass count for nominal damages only.

Anstie, for the defendants, showed cause.

Cave, Q. C. (*Horace Smith* with him), for the plaintiff.¹

¹ The arguments of counsel are omitted, as well as the concurring opinions of *CLEASBY* and *AMPHLETT*, BB.—ED.

Anstie, being invited by the court to elect between a new trial and a verdict for the plaintiff for 1s. damages without a certificate for costs, elected the verdict.

BRAMWELL, B. This rule must be absolute to enter a verdict for the plaintiff for one shilling. If there were a reasonable hope of substantial damages being recovered there ought to be a new trial; but all that Mr. Cave has a right to is, I think, a verdict for a shilling. There has clearly been an asportation which the defendants have to justify. Mr. Anstie, on their behalf, had leave to add any plea he thought fit, provided it was a good plea. Suppose there were a plea to the effect that the owner of the goods was recently dead, the executor was unknown, no one was in charge of the house, that the defendants were near relations of the deceased who had visited him, and that the trespass in question was a necessary removal of the goods for their preservation and protection, and a reasonable step. I am inclined to think this would be a good plea.¹ The law cannot be so unreasonable as to lay down that a person cannot interfere for the protection of such things as rings and jewelry in the house of a man just dead. But the whole of the supposed plea was not proved. The jury found that the defendant acted *bona fide*, that is to say, that the articles were removed for their preservation; but it was not proved that the interference was reasonably necessary, that is to say, that the things were in a position to require the interference, and that the interference was reasonably carried out. Mr. Anstie ingeniously argued that the responsibility of a person under circumstances of this kind is really a question of negligence, and not of trespass. I do not think it is. But even if it were, it was not shown that the goods were in jeopardy. The supposed plea has not been proved. As the point now raised by the plaintiff never went to the jury, the defendants would be entitled to a new trial; but as they do not ask for it, the verdict must be entered for the plaintiff for 1s. damages.

Rule absolute to enter the verdict for 1s.

PUTNAM v PAYNE

SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1816.

[Reported in 13 Johnson, 312.]

IN error, on *certiorari* to a justice's court. The defendant in error brought an action in the court below against the plaintiff in error for killing his dog. It was proved at the trial that the dog was very vicious, and frequently attacked persons passing in the street, in Lansingburgh, where the parties resided. The plaintiff below had frequently

¹ *Brown v. Sullivan*, 22 Ind. 359; *Perkins v. Ladd*, 114 Mass. 420 *Accord*.
See also *Magner v. Ryan*, 19 Mo. 196; *Givens v. Higgins*, 4 McC. 286. — Ed.

been notified of the ferocious acts of his dog, and had been requested by the neighbors to kill or confine him. The dog in question had been bitten, a few days before he was killed, by a mad dog. There being a very great alarm in the village of Lansingburgh, on account of mad dogs, the inhabitants petitioned the trustees to pass by-laws for restraining dogs, and killing those that should be found at large; and the trustees accordingly passed a law, declaring it lawful for any person to kill any dog which should be found at large in the village. It was also proved that the plaintiff below called upon the defendant, and informed him that a certain other dog in the village was mad, and requested him to go and shoot it; that the defendant accordingly took his gun for that purpose, and in passing through the village met the plaintiff's dog running loose, and shot him dead. Judgment was given for the plaintiff below.

Per Curiam. It is unnecessary in this case to decide whether the act complained of could be justified under the by-law of the corporation.

The defendant was fully justified in killing the dog, under the circumstances of the case, upon common-law principles. The dog was, generally, a dangerous and unruly animal, and his owner knew it; yet he permitted him to run at large, or kept him so negligently that he escaped from his confinement. Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance. The public safety demands this rule. It is little better than mockery to say that a person injured by such an animal might sue for damages, or for penalties.

But, in addition to this, the dog had lately been bitten by a mad dog; this in itself was sufficient to justify any person in killing him, if found running at large. We do not mean to say that this would be allowed as a justification in killing more useful and less dangerous animals, as hogs, &c.

*Judgment reversed.*¹

¹ *Russell v. Barrow*, 7 Port. (Ala.) 106; *Parker v. Mise*, 27 Ala. 480, 483; *Wolf v. Chalker*, 31 Conn. 121, 128; *Uhlein v. Cromack*, 109 Mass. 273, 275; *Nehr v. State*, (Neb. 1892) 53 N. W. R. 589; *Aldrich v. Wright*, 53 N. H. 398, 414; *Maxwell v. Palmerton*, 21 Wend. 407; *Hinckley v. Emerson*, 4 Cow. 351; *Dunlap v. Snyder*, 17 Barb. 561; *Boecher v. Lutz*, 13 Daly, 28; *Dodson v. Mock*, 4 Dev. & B. 146; *Bowers v. Fitzrandolph*, Addis. 215; *King v. Kline*, 6 Pa. 318, 320; *Brown v. Carpenter*, 26 Vt. 638 *Accord.* — *Ed.*

SECTION VI. (*continued*).

(g) DISCIPLINE.

ANONYMOUS.

IN THE COMMON PLEAS, EASTER TERM, 1481.

[Reported in *Year-Book*, 21 *Edward IV.*, folio 6, placitum 1.]

A MAN brought a writ of trespass for assault and battery. *Townsend* for the defendant says *actionem non*, for we say that the plaintiff, a long time before the trespass, on such a day, &c., by a deed here made, covenanted with defendant at London to be his apprentice in the art of hosier at London, according to the custom in the said city, for two years, being then and now within age. And then he shows the matter, that he was negligent in learning his art, and would not learn his art, wherefore the defendant took him by the hand and with a rod punished him the same day when he supposes the trespass, being his apprentice by the form aforesaid, which is the same assault and battery, &c. LITTLETON, J. This is no plea, for it is not lawful for one to whip his apprentice although he does not attend to his art, for you may have a writ of covenant against him.¹ *Quære*, if a school-master may justify, for it is no prejudice to him if the scholar will not receive erudition, &c.

KING v. FRANKLIN.

AT NISI PRIUS, CORAM WATSON, B., 1858.

[Reported in 1 *Foster & Finlason*, 360.]

ACTION for false imprisonment and placing the plaintiff in irons.

The defendant was captain of, and the plaintiff a passenger in, the *Undaunted*.

The placing in irons having been proved, the defence set up was, that a mutiny was imminent, and a justification of the imprisonment for the prevention of the mutiny.

It appeared that a quarrel had arisen between the captain and some of the passengers respecting the playing of cards in a particular part of

¹ Y. B. 21 Edw. IV., fol. 53, pl. 17; Lib. Int. 591; *Commonwealth v. Baird*, 1 Ashm. (Pa.) 267 (*semble*) *Contra*.

But a master has no right to inflict corporal punishment upon an ordinary hired servant. *Commonwealth v. Baird*, 1 Ashm. (Pa.) 267; *Cooper v. State*, 8 Baxt. (Tenn.) 325; *Tinkle v. Dunivant*, 16 Lea, 503; 2 Kent, Com. (18th ed.) 261. Compare *Newman v. Bennett*, 2 Chitty, 195. — Ed.

the vessel, and some confusion arose therefrom. In the course of the dispute the plaintiff had said that the ship was a floating hotel, and the captain only the landlord of her. The captain thereupon ordered the plaintiff to be slightly ironed, stating, in his evidence, that there was no cabin in which to confine him.

WATSON, B. (in summing up). The captain has the absolute control over the passengers and crew. The contract with the passenger is to carry, board, and lodge him, and the passenger is to obey all the captain's reasonable orders, in an emergency even to work the ship when necessary. If a passenger misconduct himself at table, the captain may remove him, or may even imprison him for a short period, if imprisonment be necessary for the enforcement of his lawful commands. The rule of law is simple; the power of the captain is limited to the necessity of the case. In the present case the defendant justifies, for "that he had reasonable and probable cause to believe, and did believe, that a mutiny was imminent." To succeed in his defence he must prove the whole of this allegation. It would not be sufficient that he did believe unless he had also reasonable cause for apprehending a mutiny. The defendant appears to have taken great offence at the term "landlord of hotel" being applied to him; but the term is not altogether incorrect, except that in case of misconduct the landlord may remove the guest from the house, but as the captain cannot remove the passenger from the ship, he may, if necessary, and in moderation, imprison him. He certainly would not be justified in imprisoning a person for having called him "the landlord of an hotel."

Verdict for the plaintiff.¹

HERITAGE v. DODGE.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1886.

[Reported in 64 New Hampshire Reports, 291.]

TRESPASS, for assault and battery. Plea, the general issue, with a brief statement that the defendant was teacher of a public school in which the plaintiff was a scholar, and that the assault and battery complained of was the infliction of reasonable punishment of the plaintiff for disrespectful conduct and violation of the regulations of the school. The evidence tended to show that some of the scholars had a practice of coughing and making noises resembling coughing for the purpose of attracting attention, which disturbed the order and quiet

¹ Cases in 1 Term Rep. 536; *Boyce v. Bayliffe*, 1 Camp. 60; *Aldworth v. Stewart*, 4 F. & F. 957; *Agincourt*, 1 Hagg. C. A. 271; *Leith v. Trott*, 4 Russ. & Geld. 120; *Gardner v. Bibbins*, Bl. & Howl. 356; *Thorne v. White*, 1 Pet. Adm. Dec. 174; *The Stacey Clark*, 54 Fed. Rep. 533 *Accord*.

Compare *Noden v. Johnson*, 16 Q. B. 218; *Broughton v. Jackson*, 18 Q. B. 383. — Ed.

of the school. The defendant requested that the noises be stopped; but the disturbance continued to some extent. At the time of the assault the defendant was repeating the request to the school, when the plaintiff made a noise resembling a cough, which the defendant understood was intended by the plaintiff as an act of contempt and defiance of the teacher's authority, and thereupon the defendant inflicted the punishment complained of.

The plaintiff offered evidence tending to show that a portion of the scholars, including the plaintiff, were affected with a cough known as chin-cough or whooping-cough, and the plaintiff testified that the coughing for which he was punished was involuntary, and not intended as an act of disobedience or of defiance. The plaintiff requested the following instruction: "If the jury find that the plaintiff could not help coughing by reason of a chin-cough, then the defendant was not justified in punishing the plaintiff, although the defendant believed that the plaintiff coughed for the purpose of defying his authority and disobeying the rules of the school." The court declined to give this instruction, and the plaintiff excepted.

Upon this point the court charged the jury that if the defendant, acting honestly and with reasonable caution and prudence, believed that the act of the plaintiff was intended as an act of disrespect for and contempt of the teacher's authority, and if he had reasonable cause for believing that the noise made by the plaintiff was intentional and for the purpose of showing his defiance of the reasonable requirements of the defendant in the government of the school, then the defendant was justified in inflicting moderate and reasonable punishment upon the plaintiff.

The plaintiff excepted to the foregoing instructions.

SMITH, J. The instructions requested made the defendant liable, without regard to the fact whether he exercised reasonable judgment and discretion in determining whether the plaintiff was guilty of intentional misconduct as a scholar. The law clothes the teacher, as it does the parent,¹ in whose place he stands, with power to enforce discipline by the imposition of reasonable corporal punishment.² 1 Blk. Com.

¹ Or guardian, *Stanfield v. State*, 43 Tex. 167.

On grounds of supposed expediency a child is not allowed to sue his parent for an excessive punishment. *Foley v. Foley*, 61 Ill. Ap. 577 (*semble*); *McKelvey v. McKelvey*, 111 Tenn. 388. Nor for other wrongs to the person. *Hewlett v. George*, 68 Miss. 703 (imprisonment); *Roller v. Roller*, 37 Wash. 242 (rape). But see *contra* *Treschman v. Treschman*, 28 Ind. Ap. 206 (*semble* — battery); *Clasen v. Pruhs*, 69 Neb. 278 (battery). — Ed.

² *Keit's Case*, 3 Salk. 47; *Fitzgerald v. Northcote*, 4 F. & F. 656; *Vizard v. Neate*, 65 Law Times, 383; *Cleary v. Booth* [1893], 1 Q. B. 465 (for misconduct on the way home from school); *Mansell v. Griffin* [1908], 1 K. B. 160; *Sheehan v. Sturges*, 53 Conn. 481; *Cooper v. McJunkin*, 4 Ind. 290; *Danenhoffer v. State*, 69 Ind. 295; *Vanvactor v. State*, 113 Ind. 11; *State v. Vanderbilt*, 116 Ind. 113; *State v. Mizner*, 45 Iowa, 248, 50 Iowa, 145; *Patterson v. Nutter*, 78 Me. 509; *Commonwealth v. Randall*, 4 Gray, 36; *Deekins v. Gose*, 85 Mo. 485; *State v. Pendergraas*, 2 Dev. & B. 365; *State v. Alford*, 68 N. Ca. 322; *Commonwealth v. Seed*, 5 Pa. L. J. 78; *Anderson v. State*, 3 Head, 455; *Dowlen v. State*, 14 Tex. Ap. 61; *Bolding v. State*, 23 Tex. Ap. 172; *Lander v. Seaver*, 32 Vt. 114; *Morrow v. Wood*, 35 Wis. 59; *State v. Burton*, 45 Wis. 150 (*semble*); *Muckarsie v. Dickson* (Court of

453; 2 Kent Com. 205; Reeve Dom. Rel. 288, 289, 375. He is not required to be infallible in his judgment. He is the judge to determine when and to what extent correction is necessary; and like all others clothed with a discretion, he cannot be made personally responsible for error in judgment when he has acted in good faith and without malice.¹

Exceptions overruled.

CHARLES MICHAELSON v. ABEL DENISON AND ANOTHER.

IN THE CIRCUIT COURT, UNITED STATES, DISTRICT OF CONNECTICUT,
SEPTEMBER, 1808.

[Reported in 3 Day, 294.]

ON the trial it appeared that Denison, one of the defendants, was the master of a vessel, and the plaintiff his mariner; and that the beating complained of consisted in the punishment inflicted by the former upon the latter, for disobedience of orders, insolent language, and personal violence.

The plaintiff's counsel contended that the master has no right to inflict corporal punishment for insolent language, nor for disobedience to orders, not relating immediately to the management of the vessel; nor, indeed, for *past* offences of any kind.

LIVINGSTON, J., in summing up, after taking notice of the weapon, which was not dangerous, the mode of punishment, which was not unusual, and the degree, which, however severe, was less than sufficient to reduce the plaintiff to submission, recognized the right of the master, during the voyage, to correct a mariner for disobedience to any reasonable commands, and for insolence, and other offences. The punishment, in its nature, is not limited to confinement, corporal chastisement being often necessary and proper; and, as to its extent, depends upon the circumstances of the case, the aggravation of the offence, or the continuance of the disobedience. This is a salutary authority, and ought to be maintained. Without it, it would be impossible to navigate our vessels.

*Verdict for the defendants.*²

Session, 1848), 11 D. 4; Ewart v. Brown (Court of Session, 1882), 10 R. 163; Ross v. Laurie (Court of Session, 1883), 10 R. 160 *Accord*.

A teacher may detain a pupil after school by way of discipline. Fertich v. Mishener, 111 Ind. 472. — *Ed*.

A priest, not being a teacher, has no right to punish a child even though he acts by the authority of the parent. Donnelley v. Territory, 5 Ariz. 291.

¹ Cooley Const. Lim. 341; Cooley Torts, 171, 172, 288; Lander v. Seaver, 32 Vt. 114; State v. Pendergrass, 2 Dev. & Bat. 385; Fitzgerald v. Northcote, 4 F. & F. 656; Reeve Dom. Rel. 288.

² "The rule on this subject is well laid down by Abbott (On Shipping, 125). By the common law, says he, the master has authority over all the mariners on board the ship, and

it is their duty to obey his commands in all lawful matters, relative to the navigation of the ship, and the preservation of good order; and, in case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner. His authority, in this respect, being analogous to that of a parent over a child, or a master over his apprentice, or scholar. Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board; but it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression." — *Per THOMPSON, C. J.*, in *Brown v. Howard*, 14 Johns. 123. See to the same effect *Aubery v. James*, 1 Vent. 70; *Lane v. Degberg*. Selw. N. P. (13th ed.) 50; *Watson v. Christie*, 2 B. & P. 224; *Rhodes v. Leach*, 2 Stark. 516; *The Agincourt*, 1 Hagg. 271, 272; *The Lowther Castle*, 1 Hagg. 384; *Aitkin v. Bedwell, M. & M.* 68; *Murray v. Moutrie*, 6 C. & P. 471; *Lamb v. Burnett*, 1 C. & J. 291; *Butler v. McLellan*, 1 Ware, 220; *Bangs v. Little*, 1 Ware, 506; *Aertsen v. Aurora, Bee*, 161; *Saunders v. Backup, Bl. & Howl.* 264; *Forbes v. Parsons, Crabbe*, 288; *Benton v. Whitney, Crabbe*, 417; *Schelter v. York, Crabbe*, 449; *Cushman v. Ryan*, 1 Story, 91; *Stout v. Weeden*, 95 Fed. 1001; *The City of Mobile*, 116 Fed. 212 (criticising *Spencer v. Kelly*, 32 Fed. 838 and *Padmore v. Piltz*, 44 Fed. 104); *Morse v. Jewett (Mass. 1871)*, 5 Dane Ab. 563; *Flemming v. Ball*, 1 Bay, 3; *Beakie v. Norrie (Court of Session, 1842)*, 5 D. 268 *Accord.* — *Ed.*

SECTION VI. (*continued*).

(A) ABATEMENT OF NUISANCES.

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1469.

[Reported in Year-Book, 9 Edward IV., folio 34, placitum 10.]

WRIT of right. CHOKE, J. The main question is, whether the pulling up of the stakes of the pond was lawful; for, if so, the tearing down of the house was lawful, for he says in his plea that he could not have pulled up the stakes without the house falling down.

Fairfax. It seems that he shall be put to his action of trespass or nuisance, for he could not enter the freehold of the plaintiff; and, sir, if a man has a sewer running from his place in London to the Thames, and it is stopped up, he cannot break the soil to clear it, but is put to his action.

CHOKE, J. When a man has *damnum et injuriam*, he may punish it by entry or action at his option. As if a man is disseised he may enter or have an assize, &c.; but, sir, our case is different from that, for if a man grants me the right of digging on his land, and of making a ditch from a certain spring to my place so as to put in a pipe to conduct the water, and then the pipe is stopped up or broken so that the water escapes, I cannot dig on his land to repair the pipe, for this right was not granted me; but if he grants me the right of digging, &c., to mend the pipe *tociens quociens*, &c., then I. And, similarly, if I prescribe to have such a conduit, I ought to prescribe for cleaning and repairing *tociens quociens*, &c., or else I cannot dig, &c. *Quod fuit negatum* in both cases, for it was said *per curiam* that this was incident to the grant.

LITTLETON, J. It seems that he may well pull up the stakes, for they were erected to his nuisance; and if he had waited to bring an action, his land might have been surrounded, and he would have lost the profits of his mill meanwhile, and it seems to me that the entry upon the plaintiff's land was lawful; to abate the nuisance for the wrong done was the wrong of the plaintiff; as if a man takes my goods and carries them upon his land, I may enter and take them, and the entry is lawful, for they came upon his land by his own wrong; but it is otherwise if I bail goods to a man, for then I cannot justify an entry into his house to take them, for they came there by no wrong, but by the act of us both, &c. And if a man holds an acre of me and another of a stranger, and I come to distrain in the acre held by me, and he, perceiving me, drives the cattle out of the acre held of me into the other, I may justify entering the latter to take the cattle *ut supra*. And, similarly, if a man

negligently suffers his house to burn, I, his neighbor, may pull down his house to avoid the danger of my own house burning.

And if water flows *juxta villam* and is stopped, any one in the vill may tear down the obstruction, &c., or otherwise the whole vill would be surrounded, &c. And if a man wrongfully imprisons me in his house, I may break the windows and hedge to escape, &c., for in all these cases it is the plaintiff's wrong, and so here.

NEEDHAM, J. If a man puts up a house to the nuisance of my house, I may be in my own house or land and pull down his house, and justify this; so in this case the defendant shall not be punished for pulling down the house nor removing the stakes; but as to the entry upon the land, this action is not brought for the entry, &c.; wherefore, &c.; but I think the entry is not lawful, for if I lease land for years, containing mines of tin, iron, lead, stone, or coal, &c., and if I enter and take some tin, &c., for this taking of the tin, &c., the termor ought not to punish me, for he cannot have the tin, &c.: and so it is of great trees; but for the entry and disturbance of the soil he ought to punish me, &c.

DANBY, C. J. If the question is, whether the law gives you trees or tin, and you cannot have them without entry, the entry seems lawful. NEEDHAM, J. It is the lessor's folly to make such a lease, &c. DANBY, C. J. If he is tenant in dower or curtesy. And, sir, in the case at bar the removal of the stakes seems lawful; for supposing the defendant were tenant for years, he could not have an assize of nuisance; and if he brought trespass he would recover damage for the wrong done before the purchase of the writ, and a nuisance, notwithstanding such suit, would continue; and so it would be mischievous if he could not abate the nuisance. And the opinion of all the judges was, that the destruction of the house was lawful, *quære* as to the entry.

LITTLETON said that DANBY was of opinion that the entry was lawful, &c., wherefore, if a man makes a ditch in his land, by which the flow of water to my mill is diminished, I may refill the ditch with the earth dug up, &c.¹

JAMES v. HAYWARD.

IN THE KING'S BENCH, EASTER TERM.

[Reported in *Croke, Charles*, 184.]

TRESPASS for breaking his close, and pulling up, cutting, and casting down a gate.

The defendant justifies, because the gate was placed cross the highway, and so fixed that the king's subjects could not pass without interruption by reason of the said gate, to the nuisance of the king's subjects;

¹ See Y. B. 8 Ed. IV., fol. 5, pl. 14. — Ed.

and therefore he pulled up, cut, and cast down the said gate to use the said way.

The plaintiff shows, that he set up two posts on each side of the way, and hung the gate upon one of the said posts, for the preservation of the springs of the wood there from cattle, so as the subjects might pass the said way without prejudice or impediment at their pleasure; and traverseth that the gate was so fixed and tied that the king's subjects could not pass without interruption by the gate.

The defendant, upon that plea, demurred.

The first question was, Whether the erecting of a gate cross an highway, which may be opened and shut at the pleasure of passengers, be a common nuisance in itself in the eye of the law? it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

Secondly, Admitting it to be a nuisance, Whether every one may pull up and cast down the said gate at their pleasure.

HYDE, Chief Justice, JONES, and WHITLOCK, for the first, conceived, that the erecting of a gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a nuisance; for it is not so free and easy a passage as if no such inclosure had been; for women and old men are more troubled with opening of gates than they should be if there were none.

But it seemed to me that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles to be nuisances; for it appears that there are many gates in divers highways which have been always allowed; and if it were a nuisance in itself there should not be any gate, for there cannot be any prescription for a nuisance:

For the second, they held, that admitting it to be a nuisance, although the usual course is to redress it by indictment, yet every person may remove the nuisance; and HYDE, Chief Justice, JONES, and WHITLOCK allowed, that the cutting of the gate was lawful; whereupon judgment was for the defendant. And JONES said, that for ancient gates upon highways, it shall be intended they are by license from the king, and upon a writ of *ad quod damnum* sued out of chancery. But I conceived, that cannot be for a stopping, &c.¹

¹ Reynolds v. Urban Council [1896], 1 Q. B. 604; Brook v. O'Boyle, 27 Ill. Ap. 384; Corthell v. Holmes, 88 Me. 376; Pontiac Co. v. Hilton, 69 Mich. 115; People v. Severance, 125 Mich. 556; Neal v. Gilmore, 141 Mich. 519; Wales v. Stetson, 2 Mass. 143; Arundel v. McCulloch, 10 Mass. 70; Shea v. Sixth Av. Co., 62 N. Y. 180; Lancaster Co. v. Rogers, 2 Barr, 114; Selman v. Wolfe, 27 Tex. 68; Godsall v. Fleming, 59 Wis. 52; Larson v. Furlong, 63 Wis. 323 *Accord*.

But if the highway is obstructed by encroachments of both the plaintiff and the defendant, the latter cannot justify the removal of the obstruction created by the plaintiff. He should remove his own encroachment. Williams v. Fink, 18 Wis. 265; Godsall v. Fleming, 59 Wis. 52. — Ed.

JONES v. WILLIAMS.

IN THE EXCHEQUER, JANUARY 28, 1843.

[Reported in 11 Meeson & Welsby, 176.]

THE judgment of the court was now delivered by

PARKE, B.¹ A rule was obtained in this case, by Mr. Erle, for judgment *non obstante veredicto* on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass *quare clausum fregit*, stated, that the defendant, before and at the said time when &c., was possessed of a dwelling house, near the *locus in quo*, and dwelt therein; and that the plaintiff, before and at &c., *injuriously and wrongfully permitted and suffered* large quantities of dirt, filth, manure, compost, and refuse, to be, *remain*, and *accumulate* on the *locus in quo*, by reason whereof divers noxious, offensive, and unwholesome smells, &c., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

The question for us to decide is, whether this plea is bad after verdict; and we are of opinion that it is.

The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrong-doer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or showing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrong-doer, by placing the filth upon the *locus in quo*, it might be removed by the party injured, without any notice to the plaintiff;² and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the *locus in quo* after-

¹ Only the opinion of the court is given. — Ed.

² Penruddock's Case, 5 Rep. 101 (*semble*); Baker's Case, 9 Rep. 53 (*semble*); Rix v. Rosewell, 2 Salk. 459; Raikes v. Townsend, 2 Smith, 9; Lonsdale v. Nelson, 2 B. & C. 302, 311; Great Falls Co. v. Wooster, 15 N. H. 412; Lakin v. Ames, 10 Cush. 19; Estes v. Kelsey, 8 Wend. 555; Smith v. Johnson, 76 Pa. 196 *Accord*. — Ed.

wards, the authorities are in favor of the necessity of a notice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*,¹ as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's *dictum* is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case*² shows that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice; for in Jenkins's Sixth Century, case 57 (no doubt referring to *Penruddock's Case*), the law is thus stated:—A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a *quod permittat* for it, *before he makes a request* to C. to abate it, for C. is a stranger to the wrong: it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrong-doer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

LORD ABINGER, C. B., observed, that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the court concurred.

Rule absolute.

¹ 2 B. & C. 302.

² 5 Rep. 101.

JAMES BROWN v. STEPHEN PERKINS AND WIFE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1858.

[Reported in 12 Gray, 89.]

SHAW, C. J.¹ This is an action for breaking and entering the plaintiff's shop, and destroying various articles of property.²

The defendants, denying the facts, and putting the plaintiff to proof, insist that if it is proved that they were chargeable with the breaking and entering, it was justifiable by law, on the ground that the shop was a place used for the sale of spirituous liquors, and so was declared to be a nuisance; that they had a right to abate the nuisance, and for that purpose to break and enter the shop, as the proof shows that it was done; that the shop contained spirituous liquors kept for sale; that the so keeping them was a nuisance by statute; that they had a right to enter by force and destroy them; that they entered for that purpose and destroyed such articles, and did no more damage than was necessary for that purpose.

The judge who sat at the trial stated that he ruled the law and directed the jury as stated in the report, subject to the opinion of the whole court, and when many other points were raised, he stated that it might be more convenient to report the whole case, so far as controverted points were presented, for the consideration of the whole court; and this, it was understood, was assented to by counsel.

Passing over all questions as to the plaintiff's case, and coming to the justification set forth in the answer, the court are of opinion, after argument, that the ruling and instructions to the jury were not correct in matter of law.

1. The court are of opinion that spirituous liquors are not, of themselves, a common nuisance, but the act of keeping them for sale by statute creates a nuisance; and the only mode in which they can be lawfully destroyed is the one directed by statute, for the seizure by warrant, bringing them before a magistrate, and giving the owner of the property an opportunity to defend his right to it. Therefore it is not lawful for any person to destroy them by way of abatement of a common nuisance, and *à fortiori* not lawful to use force for that purpose.³

2. It is not lawful by the common law for any and all persons to abate a common nuisance merely because it is a common nuisance,

¹ This statement of the decision was drawn up by the chief justice to guide the new trial. His death prevented the writing out of a fuller opinion.

² Only the opinion of the court is given. — Ed.

³ *Hamilton v. Goding*, 55 Me. 419 *Accord.* — Ed.

though the doctrine may have been sometimes stated in terms so general as to give countenance to this supposition. This right and power is never intrusted to individuals in general, without process of law, by way of vindicating the public right, but solely for the relief of a party whose right is obstructed by such nuisance.

3. If such were intended to be made the law by force of the statute, it would be contrary to the provisions of the Constitution, which directs that no man's property can be taken from him without compensation, except by the judgment of his peers or the law of the land; and no person can be twice punished for the same offence. And it is clear that under the statutes spirituous liquors are property, and entitled to protection as such. The power of abatement of a public or common nuisance does not place the penal law of the Commonwealth in private hands.

4. The true theory of abatement of nuisance is that an individual citizen may abate a private nuisance injurious to him, when he could also bring an action; and also, when a common nuisance obstructs his individual right, he may remove it to enable him to enjoy that right, and he cannot be called in question for so doing. As in the case of the obstruction across a highway, and an unauthorized bridge over a navigable watercourse, if he has occasion to use it, he may remove it by way of abatement. But this would not justify strangers, being inhabitants of other parts of the Commonwealth, having no such occasion to use it, to do the same. Some of the earlier cases, perhaps, in laying down the general proposition that private subjects may abate a common nuisance, did not expressly mark this distinction; but we think, upon the authority of modern cases, where the distinctions are more accurately made, and upon principle, this is the true rule of law.¹ *Lonsdale v. Nelson*; ² *Mayor &c. of Colchester v. Brooke*; ³ *Gray v. Ayres*; ⁴ *State v. Paul*.⁵

¹ *Mayor v. Brooke*, 7 Q. B. 376-7; *Dimes v. Petley*, 15 Q. B. 276; *Bateman v. Black*, 18 Q. B. 870; *Hubbard v. Deming*, 21 Conn. 356; *Hamilton v. Goding*, 55 Me. 419; *Corthell v. Holmes*, 87 Me. 24, 88 Me. 376; *Clark v. Ice Co.*, 24 Mich. 508; *Hopkins v. Crombie*, 4 N. H. 320; *Amoskeag Co. v. Goodale*, 46 N. H. 56; *Brown v. De Groff*, 50 N. J. 409; *Fort Co. v. Smith*, 30 N. Y. 44 (*semble*); *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561; *Moody v. Supervisors*, 46 Barb. 659; *State v. Parrott*, 71 N. Ca. 311; *Fields v. Stokley*, 99 Pa. 306; *State v. Paul*, 5 R. I. 185; *State v. Keeran*, 5 R. I. 497; *Bowden v. Lewis*, 13 R. I. 189; *Larson v. Furlong*, 50 Wis. 681, 63 Wis. 323, s. c.; *Godsell v. Fleming*, 59 Wis. 52 *Accord*.

Gunter v. Geary, 1 Cal. 462; *Burnham v. Hotchkiss*, 14 Conn. 311 (*semble*); *Gates v. Blincoe*, 2 Dana, 158 (*semble*); *Law v. Knowlton*, 26 Me. 128 (*semble*); *Graves v. Shattuck*, 35 N. H. 269 (*semble*); *Hart v. Mayer*, 9 Wend. 571 (*semble*); *Wetmore v. Tracy*, 14 Wend. 250 (*semble*); *Meeker v. Van Rensselaer*, 15 Wend. 397 (*semble*); *Renwick v. Morris*, 7 Hill, 575 (*semble*) *Contra*.

Compare *Gerry v. Ellis*, 1 Cush. 306; *Ely v. Supervisors*, 36 N. Y. 297; *Strickland v. Woolworth*, 3 Th. & C. 286; *Rung v. Schoneberger*, 2 Watts, 23; *Jenkins v. Fowler*, 24 Pa. 308. — Ed.

² 2 B. & C. 311, 312, and 3 D. & R. 566, 567.

³ 7 Ad. & El. N. R. 376, 377.

⁴ 7 Dana, 375.

⁵ 5 R. I. 185.

5. As it is the use of a building, or the keeping of spirituous liquors in it, which in general constitutes the nuisance, the abatement consists in putting a stop to such use.

6. The keeping of a building for the sale of intoxicating liquors, if a nuisance at all, is exclusively a common nuisance; and the fact that the husbands, wives, children or servants of any person do frequent such a place and get intoxicating liquor there, does not make it a special nuisance or injury to their private rights, so as to authorize and justify such persons in breaking into the shop or building where it is thus sold, and destroying the liquor there found, and the vessels in which it may be kept; but it can only be prosecuted as a public or common nuisance in the mode prescribed by law.

Upon these grounds, without reference to others, which may be reported in detail hereafter, the court are of opinion that the verdict for the defendants must be set aside, and a *New trial had.*

JONES v. JONES.

IN THE EXCHEQUER, APRIL 29, 1862.

[Reported in 1 *Hurlstone & Coltman*, 1.]

DECLARATION. For that the defendants broke and entered the dwelling-house and land of the plaintiff, situate in the parish of Llandewy Brefi, in the county of Cardigan, and bounded on all sides thereof by certain common or waste lands called "Llandewy Brefi Mountain or Waste," which said dwelling-house was then actually inhabited by the plaintiff and his family, and in which he then was; and then, and whilst the plaintiff was therein, pulled down and destroyed the said dwelling-house and the fixtures therein, and assaulted the plaintiff then being therein; and then by so pulling down the said dwelling-house endangered the lives and hurt and injured the persons of the plaintiff and his family, and ejected and expelled them therefrom, and kept them so expelled for a long space of time; and also then seized and took away, and wrongfully converted to their own use, and destroyed the materials of the said house. And by means of the premises the plaintiff was deprived of the use and possession of his said house and land, and was put to great expense in procuring another house and land, and was and is otherwise injured.

Third plea. As to breaking and entering the dwelling-house and land, and pulling down and destroying the dwelling-house and fixtures therein, and seizing and taking the materials of the said house; that the defendant John Jones, at the time of the alleged trespasses, was possessed of land, the occupiers whereof for thirty years before this suit enjoyed, as of right and without interruption, common of pasture over

the said land, for all their cattle, levant and couchant, upon the said land of the defendant John Jones, at all times of the year, as to the said land appertaining; that the alleged trespass to the said land was in use by the defendant John Jones of the said right of common; and because the said house had been wrongfully erected and then was wrongfully in and upon the said land, so that without pulling down the same the defendant John Jones could not use or enjoy his said common of pasture in and throughout the said land in so ample and beneficial manner as he otherwise would, might, and ought to have done, the defendant John Jones in his own right, and the other defendants, as his servants and by his command, necessarily and unavoidably committed the alleged trespasses in the introductory part of this plea mentioned in removing the said house, doing no unnecessary damage to the plaintiff on the occasion aforesaid, which are the alleged trespasses in the introductory part of this plea mentioned.

Demurrer, and joinder therein.

Dowdeswell, in support of the demurrer.

Hannen, contra.¹

Cur. adv. vult.

The judgment of the court was now delivered by

CHANNEL, B. The question in this case arises on a demurrer to the third plea, to which the plaintiff has replied as well as demurred. The decision of the question is of no importance to the parties, except as regards the matter of costs. The plea was impeached principally on the authority of *Perry v. Fitzhowe*,² which, it was contended by the plaintiff, was precisely in point. One member of the court is of opinion that that case may be distinguished from the present, and that the principle intended to be there laid down may be gathered from the explanation of that case by Lord Denman, C. J., when delivering the judgment of the Court of Exchequer Chamber, in *Harvey v. Bridges*.³ The majority of the court are, however, of opinion that *Perry v. Fitzhowe* is not distinguishable from the present case. We decline to express any opinion as to whether, if this question had come before us for the first time, we should have concurred in the judgment pronounced by the Court of Queen's Bench in *Perry v. Fitzhowe*; but, seeing that the question is of no importance except as regards costs, we think it better, as the court is not unanimous, to abide by that decision, and leave the defendant, if dissatisfied with it, to take the case to a court of error. Our judgment will therefore be for the plaintiff.

*Judgment for the plaintiff.*⁴

¹ The arguments of counsel are omitted. — ED.

² 8 Q. B. 757.

³ 14 M. & W. 437.

⁴ *Perry v. Fitzhowe*, 8 Q. B. 757 *Accord.* But if notice is first given to the occupant of the house to depart, and he persists in remaining, the owner of the easement may pull down the house. *Davies v. Williams*, 16 Q. B. 546; *Lane v. Capsey*, '91, 3 Ch. 411.

BRILL v. FLAGLER.

SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1840.

[Reported in 23 *Wendell*, 354.]

By the Court, NELSON, C. J.¹ The important question in the case, however, is whether the facts set up in the third plea constitute a bar to the action. After a full consideration, I am of opinion they do. The demurrer admits that the dog was in the constant habit of coming on the premises, and about the dwelling of the defendants, day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of the family; that the plaintiff was fully advised of this mischievous propensity of the animal, and wilfully neglected to confine him, and that defendants, unable to remove the nuisance in any other way, killed him. No other authority than the experience and observation of every man is necessary to enable him to determine that the matters set forth in this plea constitute a private nuisance to the inmates of a family, and upon general principles justify all reasonable means to remove it. It would be mockery to refer a party to his remedy by action; it is far too dilatory and impotent for the exigency of the case. Whatsoever unlawfully annoys, or does damage to another, is a nuisance, and may be abated by the party aggrieved, so as he commits no riot in the doing of it. 3 Black. Comm. 5. At another place, p. 215, the learned author defines it to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. The erection of a pig-sty, lime-kiln, privy, smith-forge, tobacco-mill, tallow-furnace, and the like, so near a dwelling-house that the stench incommodes the family, and makes the air unwholesome, are given in the books as pertinent illustrations of the rule whereby the injured party may take the remedy into his own hands. See Viner, tit. Nuisance, G. & W.

In the case of *Street v. Tugwell*,² an action was brought for keeping dogs so near the plaintiff's dwelling-house that his family were prevented from sleeping during the night, and were much disturbed in the daytime. There was a verdict for the defendant. On motion for a new trial, Lord Kenyon observed that he knew it was very disagreeable to have such neighbors, and that cases of the kind had been made the subject of investigation in courts of justice. He refused a new trial, but intimated that if the nuisance was continued a new action might be brought. He referred to a case in Peere Williams, 2d vol. p. 268, where the plaintiff's house being so near the church that the five o'clock morning bell disturbed her, she made an agreement with the churchwardens to erect a cupola and clock, in consideration of

¹ Only the opinion of the court upon the third plea is given. — Ed.

² Selw. N. P. 13th ed. 1070.

which the five o'clock bell should not be rung. This was deemed a good agreement, and the Chancellor granted an injunction to stay the ringing of the bell. It is worthy of remark that all of the instances to which I have referred, and in respect to which the general principle of law is laid down, are cases of erections or acts of themselves lawful, that is, made or done upon the party's own premises. Even there he must enjoy his property in such a manner as not to injure that of another person. *Sic utere tuo, ut non lædas alienum*. How much more liberally should we indulge the application of the rule, the exercise of this summary remedy, where the nuisance is found upon the premises of the party aggrieved? In the case before Lord Kenyon, if the seven pointers had been suffered to remain within the plaintiff's enclosures, it is not to be doubted but that he would have instantly granted a new trial, or that the nuisance might have been abated by the destruction of the animals, if necessary.

Even in England, where the owners of these animals are in some respects peculiarly privileged, both by the common and statute law, a party is frequently justified in destroying the dogs. It has been held that a man may kill a dog to prevent mischief to his beast, even when the dog is in the act of chasing it from his master's enclosure. 6 Bacon, 576. So, also, to prevent dangers to himself. *Id.* The keeper also may kill a dog found in a warren: Cro. Jac. 45; or chasing deer in a park, though he might have been taken alive. 3 Lev. 28.

In the case of *Putnam v. Payne*, it was decided that any person is justified in killing a ferocious and dangerous dog which is permitted to run at large by the owner or escapes through negligence, he having notice of his vicious disposition. See 9 Johns. R. 233.

The case of *Wright v. Ramscot*¹ was trespass for killing a dog. The defendant pleaded that the mastiff ran violently upon a dog of one E. B., and did then and there bite said dog, and that he, as his servant, killed the mastiff that he might do no further mischief. The plaintiff demurred; and it was conceded by Saunders, on the argument, that if the plea had stated that the mastiff could not have been otherwise taken off, it might have justified the killing. The plea under consideration seems to have been drawn with an eye to this case; and if the peace and repose of a man's family is to be regarded in the law as dear to him as the life of a common, though I admit often useful, domestic animal, the authority is direct in support of it. The fact is expressly averred that the dog could not be restrained or prevented from haunting the dwelling-house, and disturbing the family by an incessant barking and howling night and day, by a resort to means less severe than taking his life. This, I admit, is a very material averment, and the party should be held to strict proof. A needless or wanton destruction of the animal, even to prevent an acknowledged mischief, would be unjustifiable. Regarding, however, as I do, the facts stated in the plea

¹ 1 Saund. 84.

as presenting a case of serious and intolerable nuisance, of which the owner of the animal occasioning it was fully advised, but wilfully neglected to interfere; if no other reasonable means could effectually remove it short of destruction, I cannot doubt but those used were fully justified, upon established principles of the common law. The act was essential to the free and perfect enjoyment by the defendants of their property, as well as to the protection and comfort of their families.

COWEN, J., concurred.

BRONSON, J. I agree that the judgment should be reversed, because the plea was a good bar to the action, and also because improper evidence was given on the question of damages.

*Judgment reversed, and judgment for plaintiffs in error on demurrer.*¹

¹ Brown v. Carpenter, 26 Vt. 638; Woolf v. Chalker, 31 Conn. 129; Hubbard v. Preston, 90 Mich. 221 Accord.

By statute in some jurisdictions any one may kill a dog running at large away from its owner's home and unaccompanied by any person. Griggs v. Dittoe, 52 Oh. St. 601. — Ed.

SECTION VI. (*continued.*)

(i) MISCELLANEOUS EXCUSES.

GILBERT v. STONE.

IN THE KING'S BENCH, TRINITY TERM, 1641.

[Reported in *Aleyn*, 35.]

IN trespass for breaking of a house and close, the defendant pleaded that *duodecim homines ignoti modo guerrino armati tantum minabantur ei quod de vitæ suæ amissione dubitabat*; and after *quirebant et compulsabant* the defendant to go with them to the house, *quodque ob timorem minarum et per mandatum et compulsionem dictorum duodecim hominum* he did enter the said house, and returned immediately through the said close, which is the same trespass, &c. And upon demurrer, without argument, it was adjudged no plea; for one cannot justify a trespass upon another for fear, and the defendant hath remedy against those that compelled him; also the manner of the pleading was nought, because he did not show that the way to the house was through the close.¹

TAYLOR v. WHITEHEAD.

IN THE KING'S BENCH, JUNE 2, 1781.

[Reported in 2 *Douglas*, 745.]

TRESPASS for breaking and entering the close of the plaintiff, at the parish of Otley, in Yorkshire. The defendant pleaded: 1. The general

¹ *Respublica v. Sparhawk*, 1 Dall. 363 (*semble*); *Ploof v. Putnam* (Vt. 1908), 71 Atl. R. 188 *Contra*.

See Y. B. 37 Hen. VI. fol. 37, pl. 26. "But then it is to be noted, that necessity privilegeth only *quoad jura privata*, for in all cases if the act that should deliver a man out of the necessity be against the commonwealth, necessity excuseth not: for *privilegium non valet contra Rempublicam*; and as another saith, *Necessitas publica major est quam privata*: for death is the last and farthest point of particular necessity, and the law imposeth it upon every subject, that he prefer the urgent service of his prince and country before the safety of his life. As if in danger of tempest those that are in the ship throw over other men's goods, they are not answerable: but if a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot for any danger of tempest justify the throwing of them overboard, for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking, *Necesse est ut eam non ut vivam*." — BACON'S *Elements*, p. 32.

In *Waller v. Parker*, 5 Cold. 476, the plaintiff's cotton was removed by the defendant from the latter's gin-house, and scattered in a field, under threats by Confederate soldiers to burn both cotton and gin-house if he refused to comply with their demand. This duress was held to be an excuse for the conversion of the cotton. — ED.

issue. 3. That the *locus*, &c., lay contiguous to a lane of the plaintiff's, and that the said lane was adjoining to the river wharf; that the defendant had a right of way, by prescription, through and over the lane; and, that, because the lane and way were *overflowed with water from the said river* so much that the defendant *could not* at the several times, &c., *pass or repass*, he did *necessarily* go out of the said way, as near to the said way as he possibly could, into, through, and over it, &c.

The plaintiff having traversed the right of way laid in the special plea, the cause was tried before Lord Loughborough; and the jury found for the plaintiff on the general issue, and for the defendant on the special plea.

Afterwards, *Fearnly* obtained a rule to show cause, why the plaintiff should not be at liberty to enter up judgment on the issue found for the defendant, notwithstanding the finding of the jury, on the ground, that, in point of law, although the defendant had the right of way through the plaintiff's close, he was not entitled to go upon the adjoining land of the plaintiff, when the way was out of repair.

Lee, Davenport, and Wood, for the defendant.

Walker, Serjeant, for the plaintiff.¹

LORD MANSFIELD. The question is upon the grant of this way. Now it is not laid to be a grant of a way, generally, over the land; but of a precise specific way. The grantor says, You may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing ought to repair it. The grantor may bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line.

WILLES and ASHHURST, Justices, of the same opinion.

BULLER, Justice. If this had been a way of necessity, the question would have required consideration, but it is not so pleaded.² It does not appear that the defendant had no other road. There can be no ground for a repleader, for the plea is substantially bad; there is no fact alleged in it which it could serve any purpose to deny, or go to issue upon.

*The rule made absolute.*³

¹ The statement of the case has been shortened, and the arguments of counsel are omitted. — ED.

² There is no distinction in the case of a way of necessity. *Williams v. Safford*, 7 Barb. 309. — ED.

³ *Bullard v. Harrison*, 4 M. & Sel. 387; *Holmes v. Seeley*, 19 Wend. 507; *Williams v. Safford*, 7 Barb. 309 *Accord*.

See *Arnold v. Holbrook*, L. R. 8 Q. B. 96 (highway with limited dedication).

But if the owner of land subject to a private way obstructs the way, the owner of the way may go *extra viam*. *Haley v. Colcord*, 59 N. H. 7. — ED.

ROBERT CAMPBELL v. ENSIGN RACE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1851.

[Reported in 7 Cushing, 408.]

THIS was an action of trespass for breaking and entering the plaintiff's close in the town of Mount Washington, and was tried in the Court of Common Pleas, before Byington, J. The defendant pleaded the general issue, and specified in defence a right of way of necessity, resulting from the impassable state of the adjoining highway, by obstructions with snow.

The defendant introduced evidence in support of his plea.¹

But the judge ruled, that these facts constituted no defence to the action; and a verdict having been returned accordingly for the plaintiff, the defendant alleged exceptions.

W. Porter and J. C. Wolcott, for the defendant.

I. Sumner, for the plaintiff.

The opinion was delivered at September term, 1852.

BIGELOW, J. It is not controverted by the counsel for the plaintiff, that the rule of law is well settled in England, that where a highway becomes obstructed and impassable from temporary causes, a traveller has a right to go *extra viam* upon adjoining lands, without being guilty of trespass. The rule is so laid down in the elementary books,² and it is fully supported by the adjudged cases. Henn's Case; Absor v. French,³ Young v. ,⁴ Taylor v. Whitehead, Bullard v. Harrison.⁵ Such being the admitted rule of law, as settled by the English authorities, it was urged in behalf of the plaintiff in the present case, that it had never been recognized or sustained by American authors or cases. But we do not find such to be fact. On the contrary, Mr. Dane, whose great learning and familiar acquaintance with the principles of the common law, and their practical application at an early period in this commonwealth, entitle his opinion to very great weight, adopts the rule, as declared in the leading case of Taylor v. Whitehead, which he says "is the latest on the point, and settles the law."⁶ And so Chancellor Kent states the rule.⁷ We are not aware of any case in which the question has been distinctly raised and adjudicated in this country; but there are several decisions in New York, in which the rule has been incidentally recognized and treated as well-settled law. Holmes v. Seely,⁸ Williams v. Safford,⁹ Newkirk v. Sabler.¹⁰ These authorities

¹ The statement of defendant's evidence and the argument for the plaintiff are omitted. — Ed.

² 3 Bl. Com. 36; Woolrych on Ways, 50, 51; 3 Cruise Dig. 89; Wellbeloved on Ways, 38.

³ 2 Show, 28.

⁴ 1 Ld. Raym. 725.

⁵ 4 M. & S. 387, 393.

⁶ Dane Ab. 258.

⁷ 3 Kent Com. 424.

⁸ 19 Wend. 507.

⁹ 7 Barb 309.

¹⁰ 9 Barb. 652.

would seem to be quite sufficient to justify us in the recognition of the rule. But the rule itself is founded on the established principles of the common law, and is in accordance with the fixed and uniform usage of the community. Indeed, one of the strongest arguments in support of it is, that it has always been practised upon and acquiesced in, without objection, throughout the New England States. This accounts satisfactorily for the absence of any adjudication upon the question; in our courts, and is a sufficient answer to the objection upon this ground, which was urged upon us by the learned counsel for the plaintiff. When a right has been long claimed and exercised, without denial or objection, a strong presumption is raised, that the right is well founded.

The plaintiff's counsel is under a misapprehension in supposing that the authorities in support of the rule rest upon any peculiar or exceptional principle of law. They are based upon the familiar and well-settled doctrine, that to justify or excuse an alleged trespass, inevitable necessity or accident must be shown. If a traveller in a highway, by unexpected and unforeseen occurrences, such as a sudden flood, heavy drifts of snow, or the falling of a tree, is shut out from the travelled paths, so that he cannot reach his destination, without passing upon adjacent lands, he is certainly under a necessity so to do. It is essential to the act to be done, without which it cannot be accomplished. Serious inconveniences, to say the least, would follow, especially in a climate like our own, if this right were denied to those who have occasion to pass over the public ways. Not only would intercourse and business be sometimes suspended, but life itself would be endangered. In hilly and mountainous regions, as well as in exposed places near the sea coast, severe and unforeseen storms not unfrequently overtake the traveller, and render highways suddenly impassable, so that to advance or retreat by the ordinary path, is alike impossible. In such cases, the only escape is, by turning out of the usually travelled way, and seeking an outlet over the fields adjoining the highway. If a necessity is not created, under such circumstances, sufficient to justify or excuse a traveller, it is difficult to imagine a case which would come within the admitted rule of law. To hold a party guilty of a wrongful invasion of another's rights, for passing over land adjacent to the highway, under the pressure of such a necessity, would be pushing individual rights of property to an unreasonable extent, and giving them a protection beyond that which finds a sanction in the rules of law. Such a temporary and unavoidable use of private property, must be regarded as one of those incidental burdens to which all property in a civilized community is subject. In fact, the rule is sometimes justified upon the ground of public convenience and necessity. Highways being established for public service, and for the use and benefit of the whole community, a due regard for the welfare of all requires, that when temporarily obstructed, the right of travel should not be interrupted. In the words of Lord Mansfield, "it is for the general good that people

should be entitled to pass in another line." It is a maxim of the common law, that where public convenience and necessity come in conflict with private right, the latter must yield to the former. A person travelling on a highway, is in the exercise of a public, and not a private right. If he is compelled, by impassable obstructions, to leave the way, and go upon adjoining lands, he is still in the exercise of the same right. The rule does not, therefore, violate the principle that individual convenience must always be held subordinate to private rights, but clearly falls within that maxim, which makes public convenience and necessity paramount.

It was urged in argument that the effect of establishing this rule of law would be to appropriate private property to public use without providing any means of compensation to the owner. If such an accidental, occasional and temporary use of land can be regarded as an appropriation of private property to a public use, entitling the owner to compensation, which may well be doubted, still the decisive answer to this objection is quite obvious. The right to go *extra viam*, in case of temporary and impassable obstructions, being one of the legal incidents or consequences which attaches to a highway through private property, it must be assumed, that the right to the use of land adjoining the road was taken into consideration and proper allowance made therefor, when the land was originally appropriated for the highway, and that the damages were then estimated and fixed, for the private injury which might thereby be occasioned.

It was also suggested, that the statutes of the commonwealth, imposing the duty on towns to keep public ways in repair, and rendering them liable for damages occasioned by defects therein, furnish ample remedies in cases of obstructions, and do away with the necessity of establishing the rule of the common law in this commonwealth, which gives the right in such cases to pass over adjacent lands. But this is not so. Towns are not liable for damages in those cases to which this rule of the common law would most frequently be applicable — of obstructions, occasioned by sudden and recent causes, which have not existed for the space of twenty-four hours, and of which the towns have had no notice. Besides; the statute liability of towns does not extend to damages such as would ordinarily arise from the total obstruction of a highway; being expressly confined to cases of bodily injuries and damages to property.¹ *Canning v. Williamstown*,² *Harwood v. Lowell*,³ *Brailey v. Southborough*.⁴

From what has already been said, the limitations and restrictions of the right to go upon adjacent lands in case of obstructions in the highway can be readily inferred. Having its origin in necessity, it must be limited by that necessity; *cessante ratione, cessat ipsa lex*. Such a right is not to be exercised from convenience merely, nor when, by the exercise of due care, after notice of obstructions, other ways may be

¹ St. 1850, c. 5.² 1 Cush. 451.³ 4 Cush. 310.⁴ 6 Cush. 141.

selected and the obstructions avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident, arising from sudden and recent causes which have occasioned temporary and impassable obstructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case. The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveller, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass, in order to determine whether any necessity really existed, which would justify or excuse the traveller. In the case at bar, this question was wholly withdrawn from the consideration of the jury, by the ruling of the court. It will therefore be necessary to send the case to a new trial in the Court of Common Pleas.

*Exceptions sustained.*¹

HAW v. PLANNER.

IN THE KING'S BENCH, MICHAELMAS TERM, 1642.

[Reported in 2 Keble, 124.]

IN trespass the defendant justified as churchwarden that he pulled off the plaintiff's hat, he sitting covered in the church, in time of divine service, on which the plaintiff demurred, because the defendant pleads not guilty to all *preter insultum*, and as to that, that he put off his hat, and gave it him in his hand *que est eadem* and *per Curiam*, this is a good justification; and so to switch boys playing in the churchyard, or any disturbers of the peace in time of divine service, *preter* TWISDEN, who held this an assault, and the churchwarden might as well take him a box on the ear, but there being a request first made by the churchwarden, it is a good justification.

Judgment pro defendant. Nil capiat per billam.

¹ Henn's Case, W. Jones, 296; Young v. Waterpark, 1 Ld. Ray. 725; Carey v. Rae, 58 Cal. 159; Holmes v. Seely, 19 Wend. 507, 514; Williams v. Safford, 7 Barb. 309, 311; Newkirk v. Sabler, 9 Barb. 652, 655; Respublica v. Sparhawk, 1 Dall. 357, 363; Morey v. Fitzgerald, 56 Vt. 487 *Accord*.

A fortiori, if the obstruction is caused by the adjoining landowner, an entry upon his land is allowed. Absor v. French, 2 Show. 28. See also the analogous cases, Eastern Co. v. Dorling, 5 C. B. N.S. 821; Marshall v. Ulleswater Co., L. R. 7 Q. B. 166. — Ed.

GLEVER v. HYNDE AND OTHERS.

IN THE COMMON BENCH, MICHAELMAS TERM, 1674.

[Reported in 1 *Modern Reports*, 168.]

GLEVER brought an action of trespass, of assault and battery, against Elizabeth Hynde and six others, for that they at York-castle, in the county of York, him, the said plaintiff, with force and arms did assault, beat, and evil-entreat, to his damage of one hundred pounds.

The defendants plead to the *vi et armis*, not guilty; to the assault, beating, and evil-entreating, they say, that at such a place, in the county of Lancaster, one Jackson, a curate, was performing the rites and funeral obsequies, according to the usage of the Church of England, over the body of —, there lying dead, and ready to be buried; and that then and there the plaintiff did maliciously disturb him; that they, the defendants, required him to desist; and because he would not, that they to remove him, and for the preventing of further disturbance, *molliter ei manus imposuerunt, &c., quæ est eadem transgressio; absque hoc* that they were guilty of any assault, &c., within the county of York, or anywhere else *extra comitatum Lancastriæ*. The plaintiff demurs.

Turner, for the plaintiff. The defendants do not show that they had any authority to lay hands on the plaintiff; as that they were *constables* or *churchwardens*, or any *officers*; nor do they justify by the authority of any that were. If they had pleaded, that they laid hands on him to carry him before a justice of peace, perhaps it might have altered the case. The plaintiff here, if he be faulty, is liable to ecclesiastical censure; and the statute of 1 Philip & Mary, c. 3, provides a remedy in such cases.

Jones, contra. If the statute of Philip & Mary did extend to this case, yet it does not restrain other ways that the law allows to punish the plaintiff, or keep him quiet. Our Saviour himself has given us a precedent; he whipped buyers and sellers out of the Temple; which act of buying and selling was not so great an impiety, as to disturb the worship of God in the very act and exercise of it.

THE COURT. The statute of 1 Philip & Mary concerns preachers only: but there is another Act, made 1 Eliz. c. 2, f. 9, that extends to all men in orders that perform any part of the public service. But neither of these statutes take away the common law. And at the common law, any person there present might have removed the plaintiff; for they were all concerned in the service of God that was then performing; so that the plaintiff in disturbing it, was a nuisance to them all; and might be removed by the same rule of law that allows a man to abate a nuisance.

Whereupon judgment was given for the defendant, *nisi causa, &c.*¹

¹ See *Reid v. Inglis*, 12 Up. Can. C. P. 191; *Sullivan v. Old Colony Co.*, 148 Mass. 119; *Wall v. Lee*, 34 N. Y. 141. — ED.

IRELAND v. ELLIOTT.

IN THE SUPREME COURT, IOWA, JANUARY 22, 1858.

[Reported in 5 Iowa Reports, 478.]

THIS action was brought to recover damages for an assault and battery upon the plaintiff by the defendant. The jury rendered a verdict in favor of the defendant, from which the plaintiff appeals.¹

C. Ben Darwin, for the appellant.

No appearance for the appellee.

WOODWARD, J. The plaintiff requested the court to instruct the jury, that: "No amount of words, will justify an assault, or an assault and battery," which the court gave, with the following qualification: "This is so in criminal cases, but if the jury find in this action, that Ireland, by abusive words and threatening conduct, brought the battery on himself, it is a defence." The plaintiff further requested the court to instruct the jury, that: "Words alone, do not constitute such wrongful acts, as to justify an assault and battery," which the court gave, but with this modification: "Unless the words were such as to, (and were so intended and designed,) cause a prudent man to lose his reason for the time, and if the battery was not more excessive than the provocation. In such case, it is a defence in a civil action for damages, provided the plaintiff was the wrong-doer."

The time permits but a brief attention to the question here presented, and in truth, it requires but a word. Provoking and insulting language, constitute a defence to acts of violence, in a civil action, no more than in a criminal prosecution. The farthest that the law has gone, and the farthest that it can go, whilst attempting to maintain a rule, is to permit the high provocation of language, to be shown as a palliation for the acts and results of anger; that is, in legal phrase, to be shown in mitigation of damages. Thus far the law has gone and no farther. Language which, in its nature, tends generally to excite the angry passions of men, is admitted in evidence, as an extenuation, but never as a justification or defence, either in a criminal, or civil cause.²

The judgment of the District Court is reversed, and the cause is remanded.

¹ The statement of the case is abridged, and a portion of the opinion is omitted. — ED.

² Perkins v. Vaughan, 5 Scott N. E. 881, 886 (*semble*); Cushman v. Ryan, 1 Story, 91; Rohrbach v. Pullman Co., 166 Fed. 797; Armstrong v. Little, 4 Pennew (Del.), 255; Suggs v. Anderson, 12 Ga. 461; Berkner v. Dannenberg, 116 Ga. 954, 118 Ga. 835 (but see, *contra*, Tucker v. Walters, 78 Ga. 232); Sorgenfrer v. Schroeder, 75 Ill. 397; Gizler v. Witzel, 82 Ill. 322; Scott v. Fleming, 16 Ill. Ap. 539; Irlback v. Bierl, 101 Iowa, 240; Goucher v. Jamieson, 124 Mich. 21; Murray v. Boyne, 42 Mo. 472; Burley v. Menefee, 129 Mo. Ap. 518; Roth v. Slobodien (N. J. 1905), 60 Atl. R. 59; Keyes v. Devlin, 3 E. D. Sm. 518; Kif

M. C. REESE v. LINDA BARBEE.

IN THE SUPREME COURT, MISSISSIPPI, OCTOBER, 1883.

[Reported in 61 Mississippi Reports, 181.]

CHALMERS, J., delivered the opinion of the court.¹

This case was heretofore before us and will be found with the facts briefly stated in 60 Miss. 906. The case has here been tried the second time in the court below, and has resulted in a verdict of nine hundred and seventy-six dollars for the plaintiff, from which the defendant appeals. The only assignment of error presented is to the action of the court below in instructing the jury that drunkenness of the defendant at the time of the commission of the assault was no defence against the action for damages, but was "an element aggravating said assault." The addition of the words, "an element aggravating said assault," it is insisted, was erroneous, since as the defendant would have been fully liable for his acts if sober, he could not be more so if drunk. The language of the instruction is to be found in many text-books, but their use in criminal cases is censured, and we think properly so, in *McIntyre v. People*,² and other cases. Larceny is larceny, and manslaughter is manslaughter, whether committed by a sober or drunken man, and the one offence cannot be raised to robbery nor the other to murder by the fact of the intoxication of the guilty person. We have found no case adjudicating the point in a civil case except as to actions of slander, as to which the authorities differ,³ but we think the instruction was certainly correct under the facts of this case. Here a pregnant woman was advanced upon by a drunken man, pointing a drawn pistol at her and threatening to shoot. The terror into which she was thereby thrown was undoubtedly increased, and the disastrous consequences which thereupon ensued perhaps rendered more inevitable, by reason of the intoxicated condition of her assailant, since that condition of itself was well calculated to increase her terror. It was fitting, therefore, that the jury should be told that the intoxication was an aggravation of the tort.⁴

Judgment affirmed.

v. Youmans, 86 N. Y. 324; *Hayes v. Sease*, 51 S. Ca. 534; *Daniel v. Giles*, 108 Tenn. 242; *Goldsmith v. Joy*, 61 Vt. 488; *Willey v. Carpenter*, 64 Vt. 212; *Norfolk Co. v. Brame* (Va. 1909), 63 S. E. R. 1018; *Anderson v. Marshall* (Court of Session, 1835), 13 S. 1130 *Accord*.

Manette v. Kelf, 116 La. 1107; *Lizana v. Lang*, 90 Miss. 469 (statutory) *Contra*. — ED.

¹ Only the opinion of the court is given. — ED.

² 38 Ill. 514.

³ See *Townshend on Slander and Libel*, § 249.

⁴ *Commonwealth v. Malone*, 114 Mass. 295 *Accord*. — ED.

RUTER v. FOY.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1877.

[Reported in 46 Iowa Reports, 132]

THE plaintiff avers in her petition that the defendant assaulted and beat her with a pitchfork, whereby she sustained great injuries. Trial by jury. Verdict for plaintiff for \$200. Defendant appeals.

ADAMS, J. I.¹ The defendant asked an instruction, which is in the following words: "If you find from the evidence that plaintiff was injured, or contributed to her injury, by her own act or negligence, defendant would not be liable for assault and battery upon her, and plaintiff cannot recover." The court refused to give the instruction, and the refusal is assigned as error.

The doctrine of contributory negligence has no application in an action for assault and battery. There can be no contributory negligence except where the defendant has been guilty of negligence to which the plaintiff's negligence could contribute. An assault and battery is not negligence. The former is intentional; the latter is unintentional. *Affirmed.*²

PARLET v. BOWMAN.

HILARY TERM, 1649.

[Reported in 2 Rolle's Abridgment, 567.]

IN trespass for breaking his house, if the defendant pleads that her daughter was retained in the service of the said plaintiff, and was very ill in the said house while in the service of the plaintiff, and that the defendant, her mother, entered the said house to see her daughter, which is the same trespass; this is not a good justification without the license of the owner of the house, or, at least, without asking permission to see her daughter. Adjudged on demurrer.³

¹ Only so much of the case as relates to this point is given. — ED.

² *McGhee v. Campbell*, 101 Fed. 936; *Lacey v. Louisville Co.*, 152 Fed. 124; *Steinmetz v. Kelly*, 72 Ind. 442; *Whitehead v. Mathaway*, 85 Ind. 85; *Norris v. Casel*, 90 Ind. 143; *Barholt v. Wright*, 45 Ohio St. 177 (*semble*) *Accord.* — ED.

³ A husband's desire to attend the funeral of his wife in a stranger's house gives him no right to enter the house against the will of the stranger. *Neilson v. Brown*, 13 R. I. 151.

A priest who desires to administer the sacrament of penance to a sick person requesting it, may not on that account justify the use of force in ejecting from the room a person who is lawfully there. *Cooper v. McKenna*, 124 Mass. 284. — ED.

ASHTON v. JENNINGS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1675.

[Reported in *Freeman*, 393.]

It was held, in an action of battery, that it was no good justification for a justice of peace's wife, that the plaintiff, being a doctor of divinity's wife, did go before her at a funeral, and she did *molliter manus imponere*, to pull her back into her place; for, as WYLDE said, if that should be held a good plea, at every funeral there would be nothing but scuffling for places.¹

THE EARL OF ESSEX v. CAPEL.

AT NISI PRIUS, BEFORE LORD ELLENBOROUGH, C. J., 1809.

[Reported in 4 *Campbell's Lives of the Chief Justices* (3d ed.), 225.²]

AN action being brought by the Earl of Essex against the Honorable and Reverend Mr. Capel, which charged that the defendant had committed a trespass in breaking and entering his grounds, called Cashibury Park, and with horses and hounds destroying the grass and herbage, and breaking down his fences, the defendant justified, that the fox being a noxious animal and liable to do mischief, he, for the purpose of killing and destroying him, and as the most effectual means of doing so, broke and entered the park with hounds and horses, and hunted the fox. Replication, that his object was — not to destroy the fox, but the amusement and diversion afforded by the chase. After two witnesses had been examined, Lord Ellenborough interrupted the further progress of the cause: —

“This is a contending against all nature and conviction. Can it be supposed that these gentlemen hunted for the purpose of killing vermin, and not for their own diversion? Can the jury be desired to say, upon their oaths, that the defendant was actuated by any other motive than a desire to enjoy the pleasures of the chase? The defendant says that he has not committed the trespass for the sake of the diversion of the chase, but as the only effectual way of killing and destroying the fox. Now, can any man of common sense hesitate in saying that the principal motive was not the killing vermin, but the sport? It is a sport the law of the land will not justify, without the consent of the owner of the land, and I cannot make a new law accommodated to

¹ See *Goodwin v. Avery*, 26 Conn. 585. — ED.

² *Chitty, Game Laws* (2d ed.), 31 n. (f); *Locke, Game Laws* (5th ed.), 45 s. c. — ED.

the pleasures and amusements of these gentlemen. They may destroy such noxious animals as are injurious to the Commonwealth, but the good of the public must be the governing motive.”¹

¹ *Hume v. Oldacre*, 1 Stark. 351; *Paul v. Summerhayes*, 4 Q. B. D. 9; *Glenn v. Kays*, 1 Ill. Ap. 479 *Accord*.

See *Geush v. Mynna*, Cro. Jac. 321, 2 Bulst. 60, Brownl. 224; *Millen v. Fandrye*, Poph. 161; *Pallant v. Roll*, 2 W. Bl. 900; *Gundry v. Feltham*, 1 T. R. 334; *McConico v. Singleton*, 2 Mills, C. R. 244; *Broughton v. Singleton*, 2 N. & McC. 338; *Fripp v. Hassell*, 1 Strob. 175. — Ed.

SECTION VI. (*continued*).

(j) ARREST WITHOUT WARRANT.

ANONYMOUS.

MICHAELMAS TERM, 1489 OR 1490.

[*Reported in Year-Book, 5 Henry VII., folio 6, placitum 12*]

ONE counted in trespass that the defendant, such a day and year, with force and arms, assaulted the plaintiff, and wounded him, and imprisoned him for the space of a day, &c. And the defendant justifies the wounding, because the plaintiff assaulted him the same day and year, in the same place, and the tort that he had was of his own wrong and in his defence. And, as to the imprisonment, he says that he was constable in the said vill, and because the plaintiff assaulted him, and broke the peace, he took him and carried him to jail to preserve the peace. And this was held a good plea by the whole court. *Quod nota* notwithstanding he was the person upon whom the plaintiff would have broken the peace.¹

SHARROCK v. HANNEMER.

IN THE COMMON PLEAS, HILARY TERM, 1595.

[*Reported in Croke, Elizabeth, 375.*]

FALSE imprisonment. The defendant justifies, for that he was high constable of the hundred of D., in the county of Salop, and that the plaintiff made an affray upon J. S., and that he came presently after the affray made, and J. S. prayed him that he would take sureties of the peace, because he stood in fear of his life; whereupon he committed the plaintiff to ward there (for that he would not find sureties for the peace), as it was lawful for him to do; and traverseth the imprisonment in any other county; and it was thereupon demurred. First, because a constable cannot take sureties of the peace, unless for an affray committed in his view. Secondly, because the county is not traversable. But as to the second, the court would not hear any argu-

¹ Y. B. 14 Hen. VII., fol. 7, pl. 19; Chune v. Pyot, 1 Roll. R. 237; Spilsbury v. Micklethwaite, 1 Taunt. 146; Levy v. Edwards, 1 C. & P. 40; Erie Co. v. Reigherd, 166 Fed. 247; Leddy v. Crossman, 108 Mass. 237; Davis v. Burgess, 54 Mich. 514; People v. Bartz, 53 Mich. 493; Taaffe v. Kyne, 9 Mo. Ap. 15; Willis v. Warren, 1 Hilt. 590; Taylor v. Strong, 3 Wend. 384; Mosley v. State, 23 Tex. App. 409; Johnston v. Moorman, 80 Va. 131 *Accord.* — ED.

ment; for there is no question but it is traversable when the justification is local; and so it was adjudged in the Queen's Bench, 27 Eliz. Roll. 404, betwixt Dawby and Dawby. But as to the first, ANDERSON, WALMESLEY, and BEAUMOND held that the justification is not good. For Anderson said that a constable may commit one for the breach of the peace in his view, but not if it be done out of his sight; and he cannot take an obligation for the breach of the peace, if it be not broken in his view; and an high constable is not such an officer, nor conservator of the peace, whereof the common law takes any notice, for he is not mentioned in any book; and neither the high nor petit constable can take any man's oath, that he is in fear of his life; wherefore, &c. WALMESLEY. A petit constable may commit one who hath broken the peace, although it were out of his sight, if he will not find sureties of the peace, upon information that one intends to make a battery, and to disturb the peace; for by preventing the occasion of the breach of the peace, it shall be well preserved. And although that 10 Edw. IV., 22 Edw. IV. pl. 25, 3 Hen. IV. pl. 9, are, that he may commit one upon view of the breach of the peace, and make him find surety therefor; yet 44 Edw. III. title Barr. is, that he may do it upon information of the peace broken, or to be broken, or that he comes where the persons are assembled to break it; for thereby the breach shall be avoided: but he may not take sureties by recognizance entered, because he is not a judge, nor any officer of record, but is elected by matter *in pais*, and therefore may take surety by matter *in fait*, viz., the obligation. But an high constable cannot do so; for he is not a conservator of the peace by any law, nor find I any authority which mentions him; and in the North there are not any high constables. But neither high nor petit constable can take an oath of any one, that he is in fear of his life: wherefore, &c. BEAUMOND. A constable and sheriff are conservators of the peace at the common law, and may take surety of the peace by obligation, upon view of the peace broken or tumult made: otherwise not. But they cannot take any man's oath that he is afraid of death; for he is not a judge, nor officer of record; which is the reason that an obligation taken by him shall be in his own name, and not in the Queen's name; and shall be certified at the sessions of peace. But a chief constable cannot do so; nor are they by the common law, but by custom, and for conformity: wherefore, &c. OWEN. A constable is a conservator of the peace by the common law, and may take sureties of the peace, as well before the peace broken as after, for otherwise it would be too late; and this authority at the common law yet remains, and that a chief constable may also do it. But, notwithstanding his opinion, for the reasons before expressed, it was adjudged for the plaintiff.

HANDCOCK v. BAKER.

IN THE COMMON PLEAS, JULY 1, 1800.

[Reported in 2 Bosanquet & Puller, 260.]

TRESPASS for breaking the plaintiff's dwelling-house and assaulting him therein, and dragging him out of bed, and forcing him without clothes out of his house along the public street, and beating and imprisoning him without cause.

Two of the defendants suffered judgment by default, and the other two pleaded, 1st, not guilty, 2dly, that the plaintiff in the said dwelling-house broke the peace and assaulted his wife, and purposed to have feloniously killed and slain her, and was on the point of so doing, and that, her life being in great danger, she cried "murder!" and called for assistance; whereupon the defendants, for the preservation of the peace, and to prevent the plaintiff from so killing and slaying his wife and committing the said felony, endeavoring to enter by the door, and knocked thereat; and because the same was fastened and there was reasonable cause to presume that the wife's life could not have been otherwise preserved than by immediately breaking open the door and entering the said dwelling-house, and they could not otherwise obtain possession, they did for that purpose break and enter the said dwelling-house and somewhat break, &c., doing as little damage as possible, and gently laid hands on the plaintiff, and prevented him from further assaulting and feloniously killing and slaying his said wife; and, for the same purpose, and also for that of taking and delivering the plaintiff to a constable, to be by him taken before a justice and dealt with according to law, kept and detained him a short and reasonable time in that behalf, and because he had not then proper and reasonable clothes on him, took their hands off from him, and permitted him to enter a bed-chamber, and to remain there a reasonable time, that he might put on such clothes, which he might have done; and, because he did not nor would so do, but wholly refused, and went into bed there, and remained there at the end of such reasonable time, and would not quit the same although thereto requested, the defendants, for the same purposes as they so kept and detained the plaintiff, as above mentioned, there being then no reasonable ground for presuming that he had changed his purpose of further assaulting and feloniously slaying his said wife, entered the bed-chamber in order, for those purposes, to take him therefrom, whereupon the plaintiff assaulted and would have beat the said defendants if they had not defended themselves, which they did; and if any damage happened to the plaintiff, it was occasioned by his own assault; and the defendants, for the purposes in that behalf aforesaid, gently laid hands upon the plaintiff

and took him from the bed and out of the dwelling-house along the public streets for a reasonable time, and kept and detained him for a short and reasonable time for those purposes, till they could find a constable, and, as soon as they could find a constable, delivered him to the constable for the purpose in that behalf aforesaid.

The plaintiff replied *de injuria sua propria*, and, by way of new assignment, pleaded that he sued out his writ and declared as well for the trespasses justified as also for that the defendants, at the times when, &c., beat and ill-treated the plaintiff with much greater violence and imprisoned him for a longer time than was necessary and proper for any of the purposes in the plea mentioned.

Issue having been joined on the replication and new assignment, the cause was tried before Grose, J., at the last spring assizes for Norfolk, when the jury found for the plaintiff on the general issue, and for the defendants on the special justification.

In Easter term last a rule *nisi* was obtained, calling on the defendants to show cause why the judgment for the defendants on the special justification should not be arrested, and a verdict entered for the plaintiff on the general issue, with 1s. damages. The case having stood over till this term,

LORD ELDON, C. J. If the reasoning be good that a wife ought to apply for assistance to those courts where the law has provided assistance for her, it will equally apply to the first entry of the house by the defendants as to the subsequent assault and imprisonment which is stated to have taken place in the bedroom. I think, however, that a wife is only bound to apply to those remedies where it is probable that the injury to be apprehended will be prevented by such application. In this case, the plaintiff being about to commit a felony by killing and slaying his wife, the defendants interfered by breaking and entering the house in order to prevent the execution of that intent; and, "for the same purposes," that is, with a view to prevent the plaintiff from killing and slaying his wife, they afterwards committed the injury complained of in the bedroom, into which they had permitted him to enter in order to put on necessary clothes. It is stated that there was no reasonable ground for presuming that the plaintiff had changed his purpose, and it is argued that it ought to have been averred that his purpose actually continued; but if the preceding allegation be true, that the defendants entered the bedroom for the same purposes for which they had previously entered the house, the latter allegation was unnecessary, since the averment that it was for the same purposes sufficiently brought the question before the jury, Whether or not the defendants entered the bed-chamber and detained the plaintiff for the purpose of preventing him from killing and slaying his wife? It is not difficult to conceive that, under some circumstances, it might be more especially the defendants' duty to interfere in that manner. Suppose

A. endeavored to lay hold of B., who is in pursuit of C. with an intent to kill him, and B. thereupon ceases to pursue, with the view of effecting his purpose with more cunning, the act of ceasing to run, so far from being evidence of an intention to desist from his purpose, might afford strong evidence of an intention to prosecute it with more effect; in which case the detention of B. would be justified. In this case the jury were competent to consider whether, under all the circumstances of the case, including the presence or absence of the wife, the plaintiff got into bed with a view of more effectually executing his intent to kill his wife. In fact, the jury have found that the defendants kept and detained the plaintiff after he had gone into the bedroom for the same purposes for which they had kept and detained him before. With respect to the averment which has been supposed to be necessary, it is sufficient to answer that, after verdict, it must be presumed that everything is proved which is necessary to support the verdict; and the jury have found that it was necessary for the preservation of the woman's life that the defendants should do what they did.

HEATH, J. I am of the same opinion.

ROOKE, J. I am of the same opinion.

CHAMBRE, J. There is a great difference between the right of a private person in cases of intended felony and of breach of the peace. It is lawful for a private person to do anything to prevent the perpetration of a felony.¹ In this case it is stated that the plaintiff purposed feloniously to kill and slay his wife, to prevent which the defendants interfered in the manner stated in the plea. The justification has been found by the verdict; and the defendants, therefore, are entitled to the judgment of the court.

Rule discharged.

BOOTH v. HANLEY.

AT NISI PRIUS, CORAM ABBOTT, C. J., JUNE 15, 1826.

[Reported in 2 Carrington & Payne, 288.]

ASSAULT and false imprisonment. Plea: General issue. (There were also several justifications, but they were not proved.)

The defendant Hanley was a police officer; and it appeared that at about half-past ten o'clock, on the night of the 1st of October, 1825, the plaintiff was in Paul Street, Finsbury, and that he was turning to the wall for a particular occasion, when a watchman came up to him and collared him; and on this, a scuffle ensuing between the plaintiff and the watchman, the defendant Hanley came up, and (with the other

¹ Y. B. 2 Ed. IV. fol. 8, pl. 20; Y. B. 9 Ed. IV. fol. 26, pl. 36; Maleverer v. Spinks, Dy. 36 b Accord. — ED.

defendants) took the plaintiff to the watch-house of St. Leonard, Shoreditch, where he was locked up.

ABBOTT, C. J. (in summing up the case to the jury). The watchman certainly had no right to go up to a man and collar him for that which the plaintiff appears to have been doing. He might have gone up to him and remonstrated with him, or have asked him to go somewhere else; but he clearly had no right to assault him for that.

Verdict for the plaintiff. Damages, £20.¹

TIMOTHY v. SIMPSON.

IN THE EXCHEQUER, HILARY TERM, 1835.

[Reported in 1 Crompton, Meeson, & Roscoe, 757.]

PARKE, B., now delivered the judgment of the court.² This was an action of trespass and false imprisonment, tried before me at the sittings after Trinity term last at Guildhall. The declaration was for an assault and false imprisonment; to which there was a plea of not guilty, and a special plea of justification, on the ground that the plaintiff was guilty of a breach of the peace in the defendant's dwelling-house, and that he thereupon gave him in charge to a policeman, who was not averred to have had view of the breach of the peace. To this special plea there was a replication of *de injuria sua propria absque tali causa*. On the trial the jury found a verdict for the plaintiff on the general issue, and for the defendant on the special plea, as I was of opinion that the material parts of it were proved; but, as it appeared to me that the plea was bad in law, I directed the jury to assess the damages on the general issue, and I also gave the plaintiff permission to move to enter a verdict for him on the special plea, if the court should be of opinion that it was not substantially proved. A rule *nisi* having been obtained to enter a verdict for the plaintiff, or judgment *non obstante veredicto*, the case was fully argued before my brothers, Bolland, Alderson, Gurney, and myself last term. We have since considered the case, and are of opinion that the rule ought not to be made absolute, but that there should be a new trial, unless the parties will consent to enter a *stet processus*.

The facts of the case, as to which there was little or rather no contradictory evidence, may be very shortly stated. The defendant was a linen-draper; the plaintiff was passing his shop, and, seeing an article in the window, with a ticket apparently attached to it denoting a low price, sent his companion in to buy it; the shopman refused, and

¹ Or for any merely civil wrong. *Park v. Taylor*, 118 Fed. 34. See also *Hardy v. Murphy*, 1 Esp. 294; *Wooding v. Oxley*, 9 C. & P. 1; *Hatton v. Treeby* [1897], 2 Q. B. 452; *Kurtz v. Moffitt*, 115 U. S. 487 (desertion from army); *John Bad Elk v. U. S.*, 177 U. S. 529; *State v. Dietz*, 59 Kan. 576; *Boyleston v. Kerr*, 2 Daly, 220; *Percival v. Bailey*, 70 S. Ca. 72. — Ed.

² Only the opinion of the court is given. — Ed.

demand a larger price; the plaintiff went in himself and required the article at the lower rate. The shopman still insisted on a greater price; the plaintiff called it an "imposition." Some of the shopmen desired him to go out of the shop, in a somewhat offensive manner; he refused to go without the article at the price he bid for it; the shopmen pushed him out. Before they did so, he declared he would strike any one who laid hands on him. One of the shopmen, really supposing or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face, near the shop-door; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part, and fell on the plaintiff. There was a great noise in the shop, so that the business could not go on; many persons were there, and others about the street-door. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the ground struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman, who soon afterwards came; in the mean time the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat, which he had lost in the scuffle. He was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police-station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped.

Upon these facts the plaintiff appears to have been, in the first instance, a trespasser, by refusing to quit the shop when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police-officer having, by the stat. 10 Geo. IV. c. 44, § 4, the same powers as a constable has at common law. It is not necessary for us to decide in the present case whether a private individual, who has seen an affray committed, may give in charge to a constable who has not, and such constable may thereupon take into his custody the

affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal. The power of a constable to take into his custody upon the reasonable information of a private person under such circumstances, and of that person to give in charge, must be correlative. Now, as to the authority of a constable, it is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock v. Hannemer*; but whether he has that power, in order to take before a magistrate that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power. 2 Hale's Pleas of the Crown, 89. And the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case referred to in 2 East's Pleas of the Crown, 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Camp. N. P. C. 421. On the other hand, there is a *dictum* to the contrary in Brooke's Abr. Faux Impt. 6, which is referred to and adopted by Lord Coke in 2d Inst. 52; Lord Holt, in *The Queen v. Tooley*,¹ expresses the same opinion. Lord Chief Justice Eyre, in the case of *Coupey v. Henley*,² does the same. And many of the modern text-books state that to be the law. Burn's Justice (26th ed.), Arrest, 258; Bacon's Abr. D. Trespass, 53; 2 East's Pleas of the Crown, 506; Hawkins's Pleas of the Crown, book 2, c. 13, § 8. Upon the present occasion, however, we need not examine and decide between these conflicting authorities; for here the defendant, who had immediately before witnessed an affray, gave one of the affrayers in charge to the constable on the very spot where it was committed, and whilst there was a reasonable apprehension of its continuance; and we are of opinion that he was justified in so doing, though the constable had seen no part of the affray.³ It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. Lombard, in his *Eirenarcha*, chap. 3, p. 130, says, "Any man also may stay the affrayers until the storm of their heat be calmed, and then may he deliver them over to a constable to imprison them till they find surety for the peace; but he himself may not commit them to prison, unless the one of them be in peril of death by some hurt, for then may any man carry the other to the gaol till it be known whether he, so hurt, will live or die, as appeareth by the stat. 3 Hen. VII. c. 1." In Hawk. P. C. book 1, c. 63, § 11, it is said that it seems agreed that any one who sees others fighting may lawfully part them, and also stay them until the heat be over, and then deliver them to the

¹ 2 Ld. Raym. 1801.

² 1 Esp. 540.

³ *Ingle v. Bell*, 1 M. & W. 516; *Cohen v. Huskisson*, 2 M. & W. 477; *Balt. Co. v. Cain*, 81 Md. 87 *Accord.*—Ed.

constable, who may carry them before a justice of the peace in order to their finding sureties for the peace; and pleas founded upon this rule, and signed by Mr. Justice Buller, are to be found in 9 Went. Plead. 344, 345, and De Grey, C. J., on the trial, held the justification to be good. It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace-officer.¹ And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue; and during the affray the constable may not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, P. C. vol. ii. p. 89. The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police-officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of the fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned from violence; and if he had the power to arrest all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as, upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of peace-officers, whose power of interposition on their own view appears not to differ from that of any of the king's other subjects. For these reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police-officer.

¹ *A fortiori*, a private person may arrest an affrayer, and deliver him to an officer who was a witness of the breach of the peace. *Price v. Seeley*, 10 Cl. & F. 28; *Derecourt v. Corbishley*, 5 E. & B. 188; *Green v. Bartram*, 4 C. & P. 308; *Howell v. Jackson*, 6 C. & P. 723; *Wheeler v. Whiting*, 9 C. & P. 262; *Jordan v. Gibbon*, 3 F. & F. 607.—Ed

This brings me to the second question, whether the plea upon the record was substantially proved. I thought upon the trial that it was, but, upon further consideration, I concur with the rest of the court in thinking that it was not. The plea was as follows: "And the defendant says that before and at the said time when, &c., the said defendant was lawfully possessed of a certain dwelling-house in the city of London, and the said defendant being so possessed thereof, the said plaintiff just before the said time when, &c., entered and came into the said dwelling-house, and then and there, with force and arms, made a great noise, disturbance, and affray therein, and then and there insulted, abused, and ill-treated the defendant and his servants in the said dwelling-house, and greatly disturbed and disquieted them in the peaceable and quiet possession of the said dwelling-house, in breach of the peace of our said lord the king, whereupon the defendant then and there requested the plaintiff to cease his noise and disturbance, and to depart from and out of the said house, which the plaintiff then and there wholly refused to do, and continued in the said house, making the said noise, disturbance, and affray therein, whereupon the defendant, in order to preserve the peace and restore good order and tranquillity in the said house, then and there gave charge of the plaintiff to a certain policeman of the city of London, and then and there requested the said policeman to take the plaintiff into his custody, to be dealt with according to law; and the said policeman, so being such policeman as aforesaid, at such request of the defendant, then and there gently laid his hands on the plaintiff for the cause aforesaid, and did then and there take the plaintiff into his custody." The replication puts in issue all the allegations constituting the ground of the arrest, and of these it is not necessary to prove all. It is enough to establish so many of them as would justify the arrest. It is not enough to prove facts which justify the imprisonment: it is necessary to prove such of the facts alleged as would do so. The allegations which were proved were the entry into the defendant's house, the assault on his servants, the disturbance of the defendant in his possession of the house, by an affray in it, in which the plaintiff bore a part, just before the time of the arrest, and that the defendant gave the plaintiff in charge in order to preserve the public peace; but the fact of an assault on the plaintiff [defendant?] himself was not proved, and that is the only breach of the peace which in the plea appears by necessary implication to have been committed in the defendant's presence; for in none of the other alleged facts is the defendant's presence inserted or necessarily implied before the moment of actual interference. The disturbance of the defendant in the possession of his dwelling-house might have occurred by an entry in his absence, and therefore that averment does not by necessary implication affect the defendant's presence. If so, the substance of this plea, that is, so many of the allegations in it as constituted a defence, was not proved, as the assault on the defendant himself was not proved. For this reason we think that the proof

failed; but, as this is a case in which an amendment would have been allowed by virtue of the late statute, as it is clear upon the facts that there was a defence, on the ground of the defendant's right to arrest for a breach of the peace in his presence, and as the declaration of my opinion that the plea was substantially proved at the time, probably prevented an application to amend, we think that there should be a new trial, when, or before which, the plea may be amended. And as ultimately there will be a verdict for the defendant, if the same evidence is adduced, the best course will be for the parties to agree to enter a *set processus*.
*Rule accordingly.*¹

REGINA v. WILLIAM WALKER.

CROWN CASES RESERVED, APRIL 29, 1854.

[Reported in *Dearsly, Crown Cases*, 358.]

THE following case was stated by Mr. Justice Cresswell.

Indictment for cutting and wounding Thomas Clarkson, with intent to disable. 2d, with intent to do some grievous bodily harm. 3d, with intent to prevent the lawful apprehension of the prisoner.

Thomas Clarkson was a sergeant in the Lancashire constabulary force, and the prisoner a police constable under him. In the evening of the 3d of January Clarkson went, as was his duty, to the house of the prisoner to see that he was correct in the discharge of his duty. The prisoner had some altercation with him, and Clarkson left the house, the prisoner followed and struck him, and fell when attempting to strike a second time. Clarkson then went away for assistance — returned to the prisoner's house with two police constables. The prisoner was not then at home: they returned again in two hours, and then saw him, and Clarkson told him that he must go with him to the Newton station. The prisoner said he would not stir an inch that night. Clarkson attempted to take hold of him, whereupon the prisoner struck him on the head with a clock weight and inflicted a severe wound. The jury found him guilty of wounding to prevent his lawful apprehension, and negatived the other intents charged. Having some doubt whether the apprehension was lawful I did not pass sentence, and have to request the opinion of this court as to the propriety of the conviction. The prisoner could not find bail and remained in custody.

C. CRESSWELL.

¹ *Cook v. Nethercote*, 6 C. & P. 741; *Webster v. Watts*, 11 Q. B. 311; *Price v. Seeley*, 10 Cl. & Fin. 28; *Derecourt v. Corbishley*, 5 E. & B. 188; *O'Kelly v. Harvey*, L. R. 14 Ir. 105; *Hayes v. Mitchell*, 80 Ala. 185; *Quinn v. Heisel*, 40 Mich. 576, 578-79; *State v. Lewis*, 50 Oh. St. 179 *Accord.* — ED.

On the 29th April, 1854, this case was considered by POLLOCK, C. B., PARKE, B., CRESSWELL, J., ERLE, J., and CROMPTON, J. No counsel appeared either for the Crown or for the prisoner.

POLLOCK, C. B. We are all of opinion that this conviction cannot be sustained. The jury have found the prisoner guilty upon the third count of the indictment which charges that the prisoner committed the assault with intent to prevent his lawful apprehension. We are of opinion that the apprehension was not lawful. The assault for which the prisoner might have been apprehended was committed at another time and at another place; there was no continued pursuit of the prisoner, and the interference of the prosecutor was not for the purpose of preventing an affray, nor of arresting a person whom he had seen committing an assault. The apprehension, therefore, not being lawful it follows that the prisoner could not be convicted of an assault with intent to resist his lawful apprehension.

PARKE, B. On the authority of *Timothy v. Simpson*, the officer might arrest if there was danger of an affray being renewed, but that cannot be said to have been so in the present case.

CRESSWELL, J., ERLE, J., and CROMPTON, J., concurred.

Conviction quashed.¹

SAMUEL v. PAYNE.

IN THE KING'S BENCH, APRIL 21, 1780.

[Reported in 1 *Douglas*, 359.]

ACTION of trespass and false imprisonment against Payne, a constable, and two others. The facts of the case were these: Hall, one of the defendants, charged the plaintiff with having stolen some laces from him, which he said were in the plaintiff's house. A search-warrant was granted by a justice of peace upon this charge, but there was no warrant to apprehend him. On the search, the goods were not found;

¹ *Reg. v. Gardener*, 1 Moo. C. C. 390; *Wahl v. Walton*, 30 Minn. 506; *Taylor v. Strong*, 3 Wend. 384; *Meyer v. Clark*, 41 N. Y. Sup'r Ct. 107; *State v. Lewis* (Ohio, 1893), 33 N. E. R. 405, 407 *Accord*.

A fortiori an officer, who has not seen a breach of the peace, may not after it has ceased, arrest the wrong-doer. *Coupey v. Henley*, 2 Esp. 540; *Queen v. Maraden*, L. R. 1 Cr. Cas. R. 131; *Codd v. Cabe*, 1 Ex. D. 352, 354; *Newton v. Locklin*, 77 Ill. 103 (but see *Main v. McCarty*, 15 Ill. 441); *Pow v. Beckner*, 3 Ind. 475; *Jamison v. Gaernett*, 10 Bush, 221; *Quinn v. Heisel*, 40 Mich. 576; *People v. Haley*, 48 Mich. 495; *McKay's Case*, 5 City H. Rec. 95; *State v. Lewis*, 50 Oh. St. 179.

It necessarily follows that a private person, even though a witness of a breach of the peace, may not after its termination deliver the wrong-doer into the hands of an officer. *Clifford v. Brandon*, 2 Camp. 358, 370; *Cook v. Nethercote*, 6 C. & P. 744; *Baynes v. Brewster*, 2 Q. B. 375; *Price v. Seeley*, 10 Cl. & F. 28 (*semble*); *Grant v. Moser*, 5 M. & G. 123; *Derecourt v. Corbishley*, 5 E. & B. 188; *Humphries v. Connor*, 17 Ir. C. L. R. 1; *Phillips v. Trull*, 11 Johns. 486; *Sternack v. Brooks*, 7 Daly, 142. — Ed.

however, Payne, Hall, and the other defendant, an assistant of Payne's, arrested the plaintiff, and carried him to the Poultry Compter on a Saturday, when no alderman was sitting, by which means he was detained till Monday, when, after examination, he was discharged. The cause was tried before Lord Mansfield, and a verdict found against all the three defendants. At the trial, his Lordship and the counsel on both sides looked upon the rule of law to be, that, if a felony has actually been committed, any man, upon reasonable probable grounds of suspicion, may justify apprehending the suspected person to carry him before a magistrate;¹ but that, if no felony has been committed, the apprehension of a person suspected cannot be justified by anybody. His Lordship therefore left it to the jury to consider whether any felony had been committed. The rule, however, was considered as inconvenient and narrow, because, if a man charges another with felony, and requires an officer to take him into custody, and carry him before a magistrate, it would be most mischievous that the officer should be bound, first to try, and at his peril exercise his judgment on the truth of the charge. He that makes the charge should alone be answerable. The officer does his duty in carrying the accused before a magistrate, who is authorized to examine and commit or discharge.

On this ground a motion was made for a new trial, and, after cause shown, the court held that the charge was a sufficient justification to the constable and his assistants, and cited *Ward's Case*, in *Clayton*;² 2 *Hale's Pleas of the Crown*, 84, 89, 91; and 2 *Hawkins*, B. 2, c. 12, and c. 13.³

*The rule made absolute.*⁴

¹ Y. B. 2 Ed. IV. fol. 8, pl. 20; Y. B. 7 Ed. IV. fol. 30, pl. 19; Y. B. 11 Ed. IV. fol. 5, pl. 8; Y. B. 5 H. VII. fol. 4, pl. 10; *Stonehouse v. Elliott*, 6 T. R. 315; *Mure v. Kaye*, 4 Taunt. 34; *Hedges v. Chapman*, 2 Bing. 523; *Hall v. Booth*, 3 Nev. & M. 316; *West v. Baxendale*, 9 C. B. 141; *Rayner v. German*, 1 F. & F. 700; *Wexford v. Smith*, 2 Root, 171; *Long v. State*, 12 Ga. 293; *Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401; *Garnier v. Squires*, 62 Kan. 321; *Botts v. Williams*, 17 B. Mon. 687; *Gale v. Hoyt* (Mass. 1796), 5 Dane Ab. 588; *State v. Holmes*, 48 N. H. 377; *Reuck v. McGregor*, 3 Vroom, 70; *Spencer v. Anness*, 3 Vroom, 100; *Holley v. Mix*, 3 Wend. 350; *Burns v. Erben*, 40 N. Y. 463; *Limbeck v. Gerry*, 15 N. Y. Misc. Rep. 663; *State v. Bryant*, 65 N. Ca. 227; *Wakely v. Hart*, 6 Binn. 316; *Brooks v. Commonwealth*, 61 Pa. 352 *Accord*.

Guppy v. Brittlebank, 5 Price, 525 *Contra*.

Compare *Bright v. Patton*, 5 Mackey, 534. — Ed.

² *Clayt.* 44 Pl. 76.

³ The new trial came on before Lord Mansfield at the sittings after this term, when a verdict was found against Hall, and for the other two defendants.

⁴ Y. B. 17 Ed. IV. fol. 5, pl. 1; Y. B. 2 Hen. VII. fol. 15, pl. 1; *Ward's Case*, *Clayt.* 44, pl. 76; *Ledwith v. Catchpole*, Holt, N. P. 483; *Lawrence v. Hedger*, 3 Taunt. 14; *Coupey v. Henley*, 2 Esp. 540; *White v. Taylor*, 4 Esp. 80; *Hobbs v. Branscomb*, 3 Camp. 420; *Isaacs v. Brand*, 2 Stark, 167; *McCloughan v. Clayton*, Holt, 478; *Rose v. Wilson*, 1 Bing. 353; *Cowles v. Dunbar*, 2 C. & P. 567; *Davis v. Russell*, 5 Bing. 354; *Nicholson v. Hardwick*, 5 C. & P. 495; *Allen v. Wright*, 8 C. & P. 526; *Williams v. Crosswell*, 2 C. & K. 428; *Werner v. Commonwealth*, 80 Ky. 387; *Miles v. Weston*, 66 Ill. 361; *Doering v. State*, 49 Ind. 56; *Burke v. Bell*, 36 Me. 317; *Kirk v. Garrett*, 84 Md. 383; *Edger v. Burke*, 96 Md. 715; *Bush v. Carter*, 98 Md. 445; *Rohan v. Sawin*, 5 Cush. 281; *Bath v. Metcalf*, 125 Mass. 274; *Cochran v. Toher*, 14 Minn. 385; *State v. Grant*, 76 Mo. 236; *Hawley v. Butler*, 54 Barb. 490;

BECKWITH v. PHILBY.

IN THE KING'S BENCH, EASTER TERM, 1827.

[Reported in 6 Barnewall & Cresswell, 635.]

THIS was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff.¹

LORD TENTERDEN, C. J. I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury,² which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and the jury having so found, I am of opinion that the action was not maintainable. *Rule refused.*

Burns v. Erben, 40 N. Y. 463; Brockway v. Crawford, 3 Jones (N. Ca.), 433; Neal v. Joyner, 89 N. Ca. 287; McCarthy v. De Armit, 99 Pa. 63; Eanes v. State, 6 Humph. 53; Lewis v. State, 3 Head, 127.

But an officer may not arrest without warrant on reasonable suspicion that the person arrested has committed in a foreign country an act which in the domestic forum is a felony. Brown v. Lizars, 2 Austral. C. L. R. 837 *Accord.* — Ed.

¹ The statement of the case and the arguments of counsel are omitted. — Ed.

² Isaacs v. Brand, 2 Stark, 167; Cowles v. Dunbar, 2 C. & P. 567; Nicholson v. Hardwick, 5 C. & P. 495; Allen v. Wright, 8 C. & P. 526; Williams v. Crosswell, 2 C. & K. 428; Rohan v. Sawin, 5 Cush. 281 (but see Mitchell v. Wall, 111 Mass. 492; Bath v. Metcalf, 125 Mass. 274) *Accord.* But it seems now to be well settled that the question of reasonable cause is a question of law for the court. Lawrence v. Hedger, 3 Taunt. 14; Mure v. Kaye, 4 Taunt. 34; Broughton v. Jackson, 18 Q. B. 383; Perryman v. Lister, L. R. 4 H. L. 521; Howard v. Clark, 20 Q. B. D. 558; Kindred v. Stitt, 51 Ill. 401; Spencer v. Anness, 3 Vroom. 100; Hawley v. Butler, 54 Barb. 490; Burns v. Erben, 40 N. Y. 463; McCarthy v. De Armit, 99 Pa. 63.

See also Hogg v. Ward, 3 H. & N. 417; Cochran v. Toher, 14 Minn. 385. — Ed.

FOX v. GAUNT.

IN THE KING'S BENCH, JUNE 8, 1832.

[Reported in 3 Barnewall & Adolphus, 798.]

TRESPASS for an assault and false imprisonment. The defendant pleaded that an evil-disposed person, to the defendant unknown, had obtained goods from him on false pretences; that the plaintiff was pointed out to him by the defendant's servant as the person who had so obtained the goods, whereupon the defendant, having probable cause of suspicion, and believing that the plaintiff was the person who had committed the offence, gave charge of him to a peace-officer, to take and keep him in custody till he should be carried before a justice, to be examined touching the premises, on which occasion the peace-officer, at the defendant's request, did so take him, &c., and brought him before a justice to be examined, &c., and the justice, not being satisfied of the plaintiff's identity, discharged him out of custody, &c. Replication: *De injuria*. At the trial before Lord Tenterden, C. J., at the Middlesex sittings after Michaelmas term, 1831, the defendant had a verdict on the above special plea. A rule nisi was obtained in the following term for judgment *non obstante veredicto*, on the ground that a private person could not justify giving another into custody on suspicion of a misdemeanor.

Hutchinson and Heaton now showed cause.¹

LORD TENTERDEN, C. J. The instances in *Hawkins* are where the party is caught in the fact, and the observation there added assumes that the person arrested is guilty. Here the case is only of suspicion. The instances in *Hale* of arrest on suspicion after the fact is over relate to felony. In cases of misdemeanor it is much better that parties should apply to a justice of peace for a warrant than take the law into their own hands, as they are too apt to do. The rule must be made absolute.

LITTLEDALE, PARKE, and TAUNTON, JJ., concurred.

*Rule absolute.*²

¹ The arguments of counsel are omitted. — ED.

² *Rose v. Wilson*, 8 J. B. Moore, 362; *Welch v. Glenister*, 2 B. & C. 699; *Marsh v. Loader*, 14 C. B. N. S. 535; *Commonwealth v. Carey*, 12 Cush. 246; *Commonwealth v. McLaughlin*, 12 Cush. 615; *Ross v. Leggett*, 61 Mich. 445; *Pinkerton v. Verberg*, 78 Mich. 573; *Danovan v. Jones*, 36 N. H. 246; *Thomas v. Turck*, 94 N. Y. 90; *People v. Pratt*, 22 Hun, 300 *Accord*.

Smith v. Donelly, 66 Ill. 464 *Contra*. — ED.

An arrest without warrant is not unconstitutional. *Rohan v. Sawin*, 5 Cush. 281, 285; *Mayo v. Wilson*, 1 N. H. 55-56, 60.

It is not material that there was time to obtain a warrant. *Davis v. Russell*, 5 Bing. 854; *Rohan v. Sawin*, 5 Cush. 281, 285-6; *Holley v. Mix*, 3 Wend. 350. — ED.

SECTION VI. (*continued*)

(k) JUSTIFICATION BY OFFICER UNDER JUDICIAL PROCESS.

ALBERT CHASE v. ORREN M. INGALLS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1867.

[Reported in 97 Massachusetts Reports, 524.]

TORT; against Ingalls, as a deputy-sheriff for Bristol, for an alleged illegal arrest of the plaintiff.

WELLS, J.¹ The execution, upon which the plaintiff was arrested and committed, was regular in form, and bore the affidavit and certificate of a magistrate as provided by the Gen. Sta. c. 124, § 5. *Prima facie*, it is a complete defence to the officers acting in accordance with its directions. The defect relied on by the plaintiff to deprive them of its protection is the fact, now admitted, that the magistrate who made the certificate was the attorney of record of the party in whose favor the execution issued.

It is settled law that an officer is protected by his precept, if the court or magistrate had authority such as the precept assumes. It is not his duty to inquire into the particular facts of the case, if the general power appear and the process be regular. He cannot be affected by any irregularity occurring prior to the issue of his precept, nor by the existence of any fact which deprives the court or magistrate of jurisdiction in that particular case, provided the defect be not disclosed by the precept itself, nor known to the officer. Even if the defect be one which renders the precept void in its operation between the parties, or for the transfer of property, yet it will not subject the officer to liability as a trespasser. See *Sandford v. Nichols*,² and cases cited to this point by the defendants.

The cases relied upon by the plaintiff do not support any doctrine inconsistent with this. The decision in *Pierce v. Atwood*³ is put expressly upon the ground that the want of authority in the magistrate appeared from the warrant itself. In *Fisher v. McGirr*,⁴ the want of jurisdiction arose from the very character of the proceeding, which the warrant disclosed. In *Piper v. Pearson*,⁵ the officer was held liable because his warrant did not show affirmatively an apparent jurisdiction, there being none in fact, and the burden being upon him to establish his justification.

Where the proceeding is, in its nature, one in which the magistrate has no right to exercise the authority under which the officer assumes

¹ Only the opinion of the court is given. — ED.

² 13 Mass. 286.

³ 1 Gray, 45.

⁴ 13 Mass. 324, 344.

⁵ 2 Gray, 120.

to act, he is held responsible, although acting in good faith; because in such case the want of authority is disclosed upon the face of the precept. But where the want of authority arises from some fact that is personal to the magistrate, or peculiar to the proceedings in the particular case, the precept cannot disclose it, and the officer is not to be held liable without actual knowledge of the fact.

The plaintiff offered no evidence to show that the defendant had actual knowledge that the certifying magistrate was disqualified; not deeming it to be material whether he knew it or not; and the testimony of the defendant, as reported, would not warrant the jury in finding such knowledge. He is not entitled now to have a jury to determine that question.

*Exceptions overruled.*¹

¹ *Cotes v. Michill*, 3 Lev. 20; *Moravia v. Sloper*, Willes, 30, 34; *Andrews v. Marria*, 1 Q. B. 3 (explaining *Philips v. Biorn*, 1 Stra. 509; *Smith v. Bouchier*, 2 Stra. 993, and *Morse v. James*, Willes, 122); *Erskine v. Hohnbach*, 14 Wall. 613; *Matthews v. Densmore*, 109 U. S. 216 (reversing s. c. 43 Mich. 461); *Harding v. Woodcock*, 137 U. S. 43; *Babe v. Coyne*, 53 Cal. 261; *Watson v. Watson*, 9 Conn. 140; *Lattin v. Smith*, 1 Ill. 284; *Brotter v. Cannon*, 2 Ill. 200; *Hill v. Figley*, 25 Ill. 156; *State v. Foster*, 10 Iowa, 435; *Banks v. Reynolds*, 3 B. Mon. 80; *Garnet v. Wimp*, 3 B. Mon. 360; *State v. McNally*, 34 Me. 210; *Sandford v. Nichols*, 13 Mass. 286, 288; *Kennedy v. Dunclee*, 1 Gray, 65, 71; *Clark v. May*, 2 Gray, 410; *Chase v. Ingalls*, 97 Mass. 524; *Underwood v. Robinson*, 106 Mass. 296; *Miller v. Horton*, 152 Mass. 540, 551; *Bird v. Perkins*, 33 Mich. 28; *Matthews v. Densmore*, 43 Mich. 461, 463; *Hines v. Chambers*, 29 Minn. 7; *Walden v. Dudley*, 49 Mo. 419; *State v. Weed*, 21 N. H. 262; *Woods v. Davis*, 34 N. H. 323; *Warner v. Shed*, 10 Johns. 138; *Savacool v. Boughton*, 5 Wend. 170; *Lewis v. Palmer*, 6 Wend. 367; *Webber v. Gay*, 24 Wend. 485; *People v. Warren*, 5 Hill, 440; *Cornell v. Barnes*, 7 Hill, 35, 36; *Fulton v. Heaton*, 1 Barb. 552; *State v. Curtis*, 1 Hayw. (N. Ca.) 471; *Cody v. Quinn*, 6 Ired. 191; *Gore v. Mastin*, 66 N. Ca. 371; *Harmon v. Gould*, *Wright*, 709; *Champaign Bank v. Smith*, 7 Oh. St. 42; *Jones v. Hughes*, 5 S. & R. 299; *Foster v. Gault*, 2 McMull. 335; *Mayer v. Duke*, 72 Tex. 445; *Stoddard v. Tarbell*, 20 Vt. 321; *Sprague v. Birchard*, 1 Wis. 457, 465; *Young v. Wise*, 7 Wis. 128; *Bogert v. Phelps*, 14 Wis. 88; *McLean v. Cook*, 23 Wis. 364; *Grace v. Mitchell*, 31 Wis. 533, 539; *Stahl v. O'Malley*, 39 Wis. 328; *Murdock v. Killips*, 65 Wis. 622 *Accord*.

The general rule is open to one exception, the reason of which is not obvious. If an officer, who is sued in trespass by A. for attaching his goods under process against B., justifies on the ground that A. got the goods by a conveyance which was fraudulent and void as against the creditors of B., it is not enough to show that the attachment was issued at the suit of one who was a creditor of B., and was regular on its face; the officer, it is held, must establish the absolute regularity of the process. *Matthews v. Densmore*, 43 Mich. 461 (but see s. c. 109 U. S. 216); *Howard v. Manderfield*, 31 Minn. 337; *Oberfelder v. Kavanagh*, 21 Neb. 483; *Williams v. Eikenberry*, 25 Neb. 731; *Noble v. Holmes*, 5 Hill, 194; *Van Etten v. Hurst*, 6 Hill, 311. — Ed.

THE PEOPLE v. WARREN.

IN THE SUPREME COURT, NEW YORK, 1843.

[Reported in 5 Hill, 440.]

CERTIORARI to the Oneida general sessions, where the defendant was convicted of an assault and battery upon one Johnson, a constable. Johnson arrested the defendant on a warrant issued by the inspectors of election of the city of Utica for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors.¹ The warrant was regular and sufficient upon its face. The defendant resisted the officer, and for that assault he was indicted. The defendant offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election, and that *Johnson knew it*. The court excluded the evidence, and the defendant was convicted. He now moved for a new trial on a bill of exceptions.

W. Hunt, for the defendant, said the evidence should have been admitted. It would have shown that the inspectors had no jurisdiction of the subject-matter; and if the officer knew it, his process was no justification of the arrest. *Parker v. Walrod*.² But,

PER CURIAM. Although the inspectors had no jurisdiction of the subject-matter, yet as the warrant was regular upon its face, it was a sufficient authority for Johnson to make the arrest, and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some *dicta* the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face, whatever he may have heard going to impeach it.³

And without hearing *T. Jenkins* (district attorney), who was to have argued for the people,
New trial denied.

HORTON v. HENDERSHOT.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1841.

[Reported in 1 Hill, 119.]

TRESPASS *de bonis asportatis*, tried at the Tompkins circuit in February, 1839, before Monell, C. Judge. Both parties are constables, and both sought to make title to the possession of the property, under

¹ 1 R. S. 137, § 37.² 16 Wend. 514.³ *Watson v. Watson*, 9 Conn. 140; *Underwood v. Robinson*, 106 Mass. 296; *O'Shaughnessy v. Baxter*, 121 Mass. 515; *State v. Weed*, 21 N. H. 262; *Webber v. Gay*, 24 Wend. 435 *Accord.* — ED.

several attachments issued by justices of the peace, in favor of several individuals, against one Edwin Dart. The plaintiff made the first levy, and took the property into his possession; and for the subsequent taking by the defendant, this action was brought. All of the attachments were regular upon their face, so as to afford a sufficient protection to the officers who served them; but in relation to the parties in whose favor they issued, all the attachments on both sides were void, because the affidavits on which they issued did not show enough to give the justices who issued them, jurisdiction to proceed in that manner. A verdict having passed for the defendant, the plaintiff now moves for a new trial on a case.

G. D. Beers, for plaintiff.

B. Johnson, for defendant.

By the Court, BRONSON, J. Both of these officers have acted under attachments, which, though void as to the parties in whose favor they issued, were regular upon their face, and without any apparent defect of jurisdiction on the part of the justices who issued them. The plaintiff levied first, and the defendant took the property out of his possession. Can the plaintiff maintain trespass for that taking? The case of *Earl v. Camp*¹ answers the question against him. The rule which justifies the officer, when acting under such process as I have mentioned, is one of protection — not of assault. It is a shield, but not a sword. The officer, when sued, may defend under such process, but he cannot build up a title upon it, which will enable him to maintain actions against third persons.

The defendant, in this case, stands simply in the attitude of defence. He claims nothing but that protection which process, apparently regular, affords to the officer who serves it. The plaintiff goes beyond that, and seeks to build up a title upon the process in his hands. He has not been sued, nor is he in any peril of suffering damage. If Dart sues him, the process will be a sufficient defence. If the plaintiffs in the process sue, because the property has been lost, the officer may answer, that their process was void. *Earl v. Camp*.¹ In short, the plaintiff is not acting on the defensive, but is suing for the benefit of persons who could not maintain actions in their own names.

The fact that the defendant was indemnified by the persons under whose process he acted, cannot alter the case. Taking an indemnity, does not deprive the officer of the protection which his process affords.

The case was put upon other grounds at the circuit; but as the one I have mentioned leads to the same result, there can be no use in granting a new trial. This is a *case* — not a bill of exceptions.

*New trial denied.*²

¹ 16 Wend. 562.

² In *Clearwater v. Brill*, 4 Hun, 728, the first officer, under similar circumstances, prevailed against the second. *Earl v. Camp*, 16 Wend. 562, was distinguished, on the ground that in that case the first officer was not in possession when the second officer levied. The distinction seems not to have been regarded in the principal case. — ED.

CAMPBELL v. SHERMAN.

IN THE SUPREME COURT, WISCONSIN, JUNE TERM, 1874.

[Reported in 35 Wisconsin Reports, 103.]

APPEAL from the Circuit Court for Eau Claire County.

Action for the unlawful seizure and conversion by the defendant, sheriff of Eau Claire County, through his deputy, and under color of his office, of his steamboat with its tackle and furniture, the property of the plaintiff. The complaint demands damages for the value of the property, and for the loss caused plaintiff in his business by the seizure.¹

COLE, J. The able and ingenious counsel for the defendant did not seriously contend that ch. 184, Laws of 1869, so far as it attempted to authorize a proceeding *in rem* against a vessel for the enforcement of a maritime contract, could be sustained as a valid enactment. The decisions of the Supreme Court of the United States are too clear and emphatic upon that question to allow any discussion, unless their binding authority is denied — a position not assumed in the argument. See *The Moses Taylor*; ² *Hine v. Trevor*; ³ *The Belfast*; ⁴ *The Eagle*.⁵ Also see decisions in the State courts in the following cases: *In re Steamboat Josephine*; ⁶ *Brookman v. Hamill*; ⁷ *Vose v. Cockcroft*; ⁸ *The Steamboat Général Buell v. Long*; ⁹ *Thorsen v. The Schooner J. B. Martin*.¹⁰ In view of these various adjudications, it is idle to argue in favor of the proposition that the State Legislature has authority to create maritime liens, or the power to confer upon a State court jurisdiction to enforce such a lien by a proceeding *in rem* against the vessel according to the practice in admiralty. That a proceeding against a vessel to enforce a contract for pilot's wages is a subject of admiralty jurisdiction, and partakes of all the incidents of a suit in admiralty, is equally well settled. It therefore results from these propositions of law, that the Circuit Court which issued the warrant commanding the sheriff to seize and safely keep the steamer *Ida Campbell* to answer any lien which should be established against the boat in favor of the plaintiff in that action for pilot's wages, had no jurisdiction of the cause, and its process was void. It gives no strength to the position of defendant's counsel, nor does it aid the discussion, to say that the Circuit Court is a court of general jurisdiction, when it is conceded that it had no jurisdiction over a proceeding exclusively vested in the courts of the United States. For as to the subject-matter of such a suit, it had no jurisdiction whatever, and the Act of the Legislature clothed the

¹ The rest of the statement of facts and the arguments of counsel are omitted.
— Ed.

² 4 Wall. 411.

³ 4 Wall. 555.

⁴ 7 Wall. 624.

⁵ 8 Wall. 15.

⁶ 39 N. Y. 19.

⁷ 43 N. Y. 554.

⁸ 44 N. Y. 415.

⁹ 18 Ohio St. 521.

¹⁰ 26 Wis. 488.

court with no power to try and determine it. The party might, of course, have brought his action in the Circuit Court to enforce a common law remedy; but when he resorted to it to enforce a maritime lien by a proceeding *in rem*, the court had no jurisdiction of the cause.

This being the case, the further question arises, Did the warrant thus issued in a cause over which that court had no jurisdiction, afford any protection to the officer for acts done in its execution? The counsel for the defendant contends that it would protect the officer, and that, if fair and regular on its face, he had no right and it was not his duty to inquire whether the court which issued it had jurisdiction of the cause. Where the subject-matter of the suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, there is certainly reason and authority for holding that an officer who executes a process fair upon its face, shall be protected. But a clear distinction exists between that case and a proceeding in which the process itself shows that the court has exceeded its jurisdiction. The rule is stated by Mr. Justice Smith in *Bagnall v. Ableman*,¹ in the following language: "When the process is fair on its face, and issued by a court or magistrate of competent jurisdiction, it is a protection to the officer. But if it be not fair and regular upon its face, or its recitals or commands show a want or excess of jurisdiction in the court or magistrate issuing it, the officer is not protected in its execution," p. 179. The form of the warrant issued in the present case is not set forth in the answer. But it was undoubtedly such a process as the clerk was required to issue upon the filing of the complaint, and it would show upon its face that it was issued in a proceeding instituted under the provisions of ch. 184. It would command the officer to attach and seize the steamer *Ida Campbell*, her tackle, apparel and furniture, if found within his county, and safely keep the same to answer all such liens as should be established against it in favor of the plaintiff in the cause. It would properly contain recital showing that a complaint had been filed with the clerk, and state the nature and amount of the demand for which a lien was claimed against the vessel. We must presume from the matters stated in the answer, that such was the form of the warrant under which the officer acted; and furthermore a process setting forth these facts would be required by the law under which the proceeding was taken. And it is very apparent that such a warrant would show upon its face the nature of the proceeding, and that the suit was instituted to enforce a maritime lien. In other words, it would show that the Circuit Court had no jurisdiction of the subject-matter of the action, and no power to hear and determine it. And we understand the rule to be, that where the process does thus show a want of jurisdiction in the court of the subject-matter of the action, it is void, and does not protect the officer. In this all the cases agree.

But it is said that this rule imposed upon the officer in the present

¹ 4 Wis. 163.

case the duty of determining, in advance of any decision of the courts of this State, the validity of an Act of the Legislature. How can it be expected, it is asked, that a mere ministerial officer could decide such a question, and thus find out that his process was void for want of jurisdiction in the court which issued it? The maxim *Ignorantia juris non excusat* — ignorance of the law, which every man is presumed to know, does not afford excuse — in its application to human affairs, frequently operates harshly; and yet it is manifest that if ignorance of the law were a ground of exemption, the administration of justice would be arrested, and society could not exist. For in every case ignorance of the law would be alleged. And consequently the answer must be given in this case, that the ignorance of the officer is of the law, and the rule is almost without an exception, that this does not excuse. It may devolve upon the officer a vast responsibility in some cases, to say that he must notice at his peril that an Act of the Legislature attempting to confer jurisdiction upon the courts is unconstitutional. But if the officer does not wish to assume all the hazard which such a rule of law imposes on him, he must require a bond of indemnity from the party for whom he is acting. It is further said that it was the duty of the officer to obey the mandate of the warrant and seize the identical steamboat which he did attach, and that he had no alternative but to obey. If the act which the writ commanded him to do was a trespass, he was not required to perform it. Nor would he be liable in that case to the plaintiff for refusing to execute a process void for want of jurisdiction.

We have examined the authorities cited on the brief of counsel for the defendant, but we find nothing in them inconsistent with the views above expressed.

The conclusion which we have reached is, that the answer does not state a defence to the action, and that the demurrer to it should have been sustained.

By THE COURT. The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.¹

¹ *Turner v. Felgate*, 1 Lev. 95; *Entick v. Carrington*, 2 Wils. 275, 19 How. St. Tr. 1029 s. c.; *Wise v. Withers*, 3 Cranch, 331; *Grumon v. Raymond*, 1 Conn. 40; *Sumner v. Beeler*, 50 Ind. 341; *Campbell v. Webb*, 11 Md. 471; *Sandford v. Nichols*, 13 Mass. 286; *Pearce v. Atwood*, 13 Mass. 324; *Fisher v. McGirr*, 1 Gray, 1, 44; *Merrit v. St. Paul*, 11 Minn. 223; *Savacool v. Broughton*, 5 Wend. 170, 172; *Sprague v. Birchard*, 1 Wis. 457; *Bagnall v. Ableman*, 4 Wis. 163 *Accord.* — Ed.

SOPHIA LASHUS v. GEORGE H. MATTHEWS.

IN THE SUPREME JUDICIAL COURT, MAINE, DECEMBER 6, 1883.

[Reported in 75 Maine Reports, 446.]

BARROWS, J.¹ The plaintiff Sophia, wife of Levi Lashus, brought this action of trespass against the defendant, a deputy sheriff in the county of Kennebec, basing her claim to recover on the ground that he had attached and carried away a small stock of goods and the furniture in a certain saloon as the property of her husband, Levi Lashus, when in fact the same belonged to her. The case was tried at the October term, 1882, and the defendant, among other matters, put in evidence a writ in a suit then still pending in the Superior Court, in favor of Mark Rollins v. Levi Lashus, being the same on which he had attached the property in controversy, and the note on which said Rollins' suit was founded, given in 1871 by Levi to said Rollins' predecessor in the office of county treasurer. The plaintiff produced a bill of sale from her husband of the stock and fixtures which were in the shop in March, 1876, purporting to be "in consideration that my wife, Sophia Lashus, has this day become responsible for certain of my debts by signing notes with me, and securing payment of the same by mortgage of real estate."

Looking at all that was in evidence, and all that was conspicuously lacking on her part, if the jury came to the conclusion that this property and business really belonged to the husband, who supported himself and his wife out of it, and had what money he wanted to spend himself — and that it did *not* belong to the wife, who knew and did so little that was material in relation to it, we are by no means sure that they erred.

They are not wont to err on that side in such cases.

The motion to set aside the verdict as against law and evidence, cannot be sustained.

But since the trial, and while the case was pending on the motion to set aside the verdict which is disposed of as above, comes the plaintiff with another motion to set aside the verdict for newly discovered evidence, the substance of which is that judgment has been rendered in favor of Levi Lashus in the suit brought by the county treasurer against him, in which the property here in controversy was attached as the property of Levi. The motion cannot prevail.

The question whether or not an officer serving in good faith and in a proper manner a writ from a court of competent jurisdiction is a trespasser in making an attachment, does not depend upon the result of the suit in which the attachment is made, nor is it affected by it in a case like this. The officer represents not the attaching creditor

¹ Only a portion of the opinion of the court is given. — ED.

² R. S., c. 31, § 22.

alone, but the law, which authorizes him to "attach and hold as security [goods and chattels] to satisfy the judgment for damages and costs which the plaintiff *may* recover."¹

The validity of the claim sued is not in issue in a suit against the officer for making the attachment, nor can it be thus collaterally tried. The plaintiff here must recover, if at all, upon the facts she alleges and proves to have existed at the time when her action was commenced and tried. The foundation of her claim is that the property was hers and so not liable to attachment for any debt which the defendant in the attachment suit might be found to owe. The process in the officer's hands afforded him a conclusive justification for all regular and lawful proceedings against the defendant therein named, and all who can assert only his rights. Nor does the dissolution of the attachment after the suit against the officer is commenced, make the officer who has simply obeyed his precept and done his duty under it, liable in such suit. If he attaches property which is not liable to attachment for the debts of the defendant named in the writ, he is responsible to the owner. That was the claim here made, but the jury have settled the vital facts against the claimant. It follows inevitably from the evidence and the finding of the jury, that the property attached by this defendant was subject to be attached and held for such judgment as the county treasurer *might* recover against Levi Lashus; and the failure of the county treasurer's suit does not make the officer a trespasser *ab initio*.

The officer in defending a suit of this sort, is neither expected nor required to come prepared to try out the issue between the parties to the suit in which he has made the attachment. They would be bound by no finding which the jury might make in his case, and if the right of the plaintiff in the attachment suit to recover were an issuable fact in a suit of this description, and the failure of the officer to establish it would make him liable to a plaintiff occupying the position that this plaintiff does, it might turn out when the attachment suit came on for trial between the parties to it, that the plaintiff there would prevail, and the officer be called upon to respond to him for failing to seize the attached property upon execution. The law does not expose its officer to any such dilemma, nor does it permit any such incongruous mixture of issues between other parties in the trial of a cause. By virtue of the law which empowers him to attach the goods and chattels of the defendant in the writ placed in his hand for service, he acquires a special property in the goods attached, and the right to contest all claims thereto asserted by any third parties unembarrassed by any question as to the maintenance of the suit in which the attachment is made.

*Motions overruled. Judgment on the verdict.*²

¹ R. S. c. 81, § 22.

² *Livingston v. Smith*, 5 Pet. 90; *Kirksey v. Dubose*, 19 Ala. 43, 51; *Walker v. Woods*, 15 Cal. 66; *Jackson v. Kimball*, 121 Mass. 204, 206; *Grady v. Bowe*, 11 Daly, 259; *Rice v. Miller*, 70 Tex. 613 *Accord*.

• See *Hall v. Stryker*, 27 N. Y. 591. — Ed.

STATE v. J. DOWNER AND A. FULLER.

IN THE SUPREME COURT, VERMONT, MARCH, 1836.

[Reported in 8 Vermont Reports, 424.]

THIS was an indictment against the respondents for resisting an officer in the execution of his office. Plea— not guilty. The defendants offered to show that the officer under an attachment against a third person was attempting to seize the goods of the defendant Downer. This evidence was excluded.¹

The opinion of the court was delivered by

REDFIELD, J. We think the testimony offered by the defendants was properly rejected by the county court. It is well settled that one may defend the possession of his property against a stranger with such force as may be necessary. But this right cannot be extended to the case of an officer whose duty it is to attach property whenever he is requested so to do. He may or may not require indemnity for the act. But it would be too much to say that he must decide all cases of doubtful property at his own hazard, or that if he attempted to make an attachment when the property was not in fact in the debtor, he might by the owner of the property be resisted to any extremity. The rule would be the same when he called out the *posse comitatus*, and the question whether the officers of justice, or the rioters, shall be held liable to indictment, must depend upon the decision of some abstract question of property, which the sagacity of no man was sufficient to foresee. And if the owner of property may resist an officer in its defence, so may one who believes himself the owner; for it will not do to predicate crime upon so subtle a distinction as an abstract right of property. It must be something more tangible.

We believe the better and safer and only practicable rule to be, that whenever the question of property is so far doubtful that the creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property even cannot justify resistance, but must yield the possession, and resort to his remedy by action. This is the only mode in which the question could be tried. And unless such a rule be adopted, no human sagacity is adequate to the decision of those nice questions which the duty of sheriffs and their officers involve.

The rule here established does not impugn that which is found in the books, "that an illegal arrest may be resisted." If the process is void, or is misapplied, it is the same as if there were no process, so far as one's person is concerned. But the case of property is very different. It depends upon *criteria* which are not the objects of sense.

¹ The statement of facts has been condensed. The arguments of counsel and a part of the opinion are omitted. — Ed.

It is well settled that if an officer have probable cause to suspect one of felony, he may proceed to arrest him by any force necessary, and is justified, notwithstanding the person shall prove to have been innocent. 2 Hale, 79; 1 East, 301; *Samuel v. Payne*; 1 Russell on C. 504.

The judgment of this court is, that respondents take nothing by their motion or exceptions, and judgment was rendered against the respondents.¹

COMMONWEALTH v. A. KENNARD AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1829.

[Reported in 8 *Pickering*, 133.]

PARKER, C. J., delivered the opinion of the court.²

The question then is reduced to this: whether the owner of goods which are in his actual possession, may not lawfully defend his possession of them against a seizure or an attachment by an officer, who comes to take them on a precept against another person, who has no right or interest in the goods.

Certainly the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment, by one who is arrested on a writ or warrant against another person.³ In such case there is no authority for the arrest, and

¹ *State v. Fifield*, 18 N. H. 34; *State v. Richardson*, 38 N. H. 208; *Faris v. Stab*, 3 Oh. St. 158; *State v. Miller*, 12 Vt. 437 (*semble*); *Merritt v. Miller*, 13 Vt. 416 (*semble*); *State v. Buchanan* 17 Vt. 573 *Accord.* — Ed.

² Only the opinion of the court is given. — Ed.

³ *Glasspoole v. Young*, 9 B. & C. 696; *Davies v. Jenkins*, 11 M. & W. 745 (*semble*); *Buck v. Colbath*, 3 Wall. 334; *North v. Peters*, 138 U. S. 271; *Sexey v. Adkinson*, 34 Cal. 346; *Brichman v. Ross*, 67 Cal. 601, 605; *Watson v. Watson*, 9 Conn. 140, 147; *Mitchell v. Malone*, 77 Ga. 301; *Miller v. Bannister*, 109 Mass. 289; *Cook v. Hopper*, 23 Mich. 511; *Kane v. Hutchisson*, 93 Mich. 488; *Braley v. Byrnes*, 20 Minn. 435; *Cross v. Phelps*, 16 Barb. 502; *Rogers v. Weir*, 34 N. Y. 463; *Maley v. Barrett*, 2 Sneed. 501; *Hays v. Creary*, 60 Tex. 445; *Formwalt v. Hylton*, 66 Tex. 288; *Heidenheimer v. Sides*, 67 Tex. 32 *Accord.*

In *Buck v. Colbath*, *supra*, Miller, J., said, p. 342: "Property may be seized by an officer of the court under a variety of writs, orders, or processes of the court. For our present purpose, these may be divided into two classes: —

"1. Those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property. Of this class are the writ of replevin at common law, orders of sequestration in chancery, and nearly all the processes of the admiralty courts, by which the *res* is brought before it for its action.

"2. Those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without

the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person arrested, will justify any resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer.¹

We cannot distinguish between an officer who assumes to act under a void precept, and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B, is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person

describing any specific property to be thus taken. Of this class are the writ of attachment, or other meane process, by which property is seized before judgment to answer to such judgment when rendered, and the final process of execution, elegit, or other writ, by which an ordinary judgment is carried into effect.

"It is obvious, on a moment's consideration, that the claim of the officer executing these writs, to the protection of the courts from which they issue, stands upon very different grounds in the two classes of process just described. In the first class he has no discretion to use, no judgment to exercise, no duty to perform but to seize the property described. It follows from this, as a rule of law of universal application, that if the court issuing the process had jurisdiction in the case before it to issue that process, and it was a valid process when placed in the officer's hands, and that, in the execution of such process, he kept himself strictly within the mandatory clause of the process, then such writ or process is a complete protection to him, not only in the court which issued it, but in all other courts.

"And in addition to this, in many cases the court which issued the process will interfere directly to protect its officers from being harassed or interfered with by any person, whether a party to the litigation or not. Such is the habitual course of the court of chancery, operating by injunction against persons who interfere by means of other courts. And instances are not wanting, where other courts have in a summary manner protected their officers in the execution of their mandates.

"It is creditable, however, to the respect which is paid to the process of courts of competent jurisdiction in this country, that the occasion for the exercise of such a power is very rare.

"In the other class of writs, to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion. *First*, in ascertaining that the property on which he proposes to levy, is the property of the person against whom the writ is directed; *secondly*, that it is property which, by law, is subject to be taken under the writ; and *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." In confirmation of this distinction drawn by Mr. Justice Miller, see *Wilmarth v. Burt*, 7 Met. 257; *Woods v. Davis*, 34 N. H. 328; *Foster v. Pettibone*, 20 Barb. 350; *Watkins v. Page*, 2 Wis. 92; *Weinberg v. Conover*, 4 Wis. 808; *Griffith v. Smith*, 22 Wis. 646. — ED.

¹ *Oliver v. State*, 17 Ark. 508; *Wentworth v. People*, 5 Ill. 550; *Elder v. Morrison*, 10 Wend. 128; *Brownell v. Durkee*, 79 Wis. 658 *Accord*.

See *Braddy v. Hodges*, 99 N. Ca. 319. — ED.

against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary. *Marshall v. Hosmer*; ¹ *Bond v. Ward*.²

It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover, or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to cover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen; but it is not a fair argument against the existence of a right, that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion that it belongs to the debtor, and the owner might be driven to a replevin, in which he must give bond with surety, or to his action for damages, in which the expense may consume the value of the property.

But it is again said, that the rule sought to be established by the defence will deprive creditors of the power of trying the question of property, in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass, if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty.

It will be recollected, that this is a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants to whose care they were committed; that they did nothing more than defend, with no more than necessary force, their possession. This decision, therefore, will form no precedent for cases which may be differently circumstanced. *Money v. Leach*; ³ *Ackworth v. Kemp*; ⁴ *Sanderson v. Baker*.⁵

We have had no authorities cited on the part of the Commonwealth, which have any tendency to show that the owner and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept.

¹ 4 Mass. R. 63.

² 7 Mass. R. 123.

³ 1 W. Bl. 555.

⁴ 1 Doug. 40.

⁵ 2 W. Bl. 832.

There are cases which show that if an officer, having a precept against a person privileged from arrest, shall arrest him, he will not be a trespasser. But in such case he is commanded to arrest the particular person, and is supposed to know nothing of the privilege; the party therefore shall be held to apply for his discharge to the court having jurisdiction of the matter.

COMMONWEALTH v. MORRIS CROTTY AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1865.

[Reported in 10 Allen, 403.]

INDICTMENT for a riot.

BIGELOW, C. J.¹ We cannot entertain a doubt that the warrant on which the officer attempted to arrest one of the defendants at the time of the alleged riot was insufficient, illegal and void. It did not contain the name of the defendant, nor any description or designation by which he could be known and identified as the person against whom it was issued. It was in effect a general warrant, upon which any other individual might as well have been arrested, as being included in the description, as the defendant himself. Such a warrant was contrary to elementary principles, and in direct violation of the constitutional right of the citizen, as set forth in the Declaration of Rights, art. 14, which declares that every subject has a right to be secure from all unreasonable searches and seizures of his person, and that all warrants, therefore, are contrary to this right, if the order in the warrant to a civil officer to arrest one or more suspected persons or to seize their property be not accompanied with a special designation of the persons or objects of search, arrest or seizure. This is in fact only a declaration of an ancient common law right. It was always necessary to express the name or give some description of a party to be arrested on a warrant; and if one was granted with the name in blank, and without other designation of the person to be arrested, it was void. 1 Hale P. C. 577; 2 Ib. 119; Foster, 312; 7 Dane Ab. 248; 1 Chit. Crim. Law, 39; Mead v. Haws,² and cases cited.

This rule or principle does not prevent the issue and service of a warrant against a party whose name is unknown. In such case the best description possible of the person to be arrested is to be given in the warrant; but it must be sufficient to indicate clearly on whom it is to be served, by stating his occupation, his personal appearance and peculiarities, the place of his residence, or other circumstances by which he can be identified. 1 Chit. Crim. Law, 39, 40.

¹ Only the opinion of the Court is given. — Ed.

² 7 Cow. 332.

The warrant being defective and void on its face, the officer had no right to arrest the person on whom he attempted to serve it. He acted without warrant and was a trespasser. The defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer. An officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; *Shadgett v. Clipson*,¹ *Rex v. Hood*,² *Hoye v. Bush*,³ *Pearce v. Atwood*,⁴ *Sanford v. Nichols*,⁵ *Commonwealth v. Kennard*; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose. 1 Chit. Crim. Law, 44; *The King v. Osmer*.⁶

The defendants, therefore, in resisting the officer in making an arrest under the warrant in question, if they were guilty of no improper or excessive force or violence, did not do an unlawful act by lawful means, or a lawful act by unlawful means, and so could not be convicted of the misdemeanor of a riot, with which they are charged in the indictment.

The instructions under which the case was submitted to the jury did not meet this aspect of the case. It must therefore go to a new trial.

*Exceptions sustained.*⁷

PAUL POOLER v. WILLIAM F. REED.

IN THE SUPREME JUDICIAL COURT, MAINE, JANUARY 5, 1882.

[Reported in 73 Maine Reports, 129.]

TRESPASS in which damages are claimed for an alleged illegal arrest of the plaintiff by the defendant, at Bangor, in June, 1880.

Writ was dated December 8, 1880.

The opinion states the material facts.

H. L. Mitchell, for the plaintiff.

Barker, Vose and Barker, for the defendant.

LIBBEY, J. The defendant justifies the arrest and imprisonment of the plaintiff, as constable of Bangor, having a legal *mittimus* therefor. He thus puts directly in issue his legal capacity as such officer.

His appointment to and acceptance of the office of justice of the peace, after his election and qualification as constable, must be held to be a surrender of the office of constable. *Stubbs v. Lee*.⁸

¹ 8 East, 323.

² 1 Mood. C. C. 281.

³ 2 Scott N. R. 86.

⁴ 13 Mass. 324, 344.

⁵ *Ib.* 236.

⁶ 5 East, 304-308.

⁷ *King v. Osmer*, 5 East, 304; *Shadgett v. Clipson*, 8 East, 328; *Rex v. Hood*, 1 Moody C. C. 281; *Hoye v. Bush*, 2 Scott, N. R. 86; *Mitchell v. State*, 12 Ark. 50, 56 *Accord.* — *Ed.*

⁸ 64 Maine, 195.

He was an officer *de facto* when he made the arrest, and while acting as such officer, his acts would be valid as to third parties; and as between them his title to the office could not be tried; but when he is a party and justifies his acts as such officer, he must show that he has a legal title to the office. *Stubbs v. Lee*,¹ *Fowler v. Bebee*,² *Sheehan's Case*,³ *Green v. Burke*,⁴ *People v. Hopson*,⁵ *Riddle v. Bedford*,⁶ *Parker v. Luffborough*,⁷ *Keyser v. McKissam*.⁸

In accordance with the agreement of the parties,

*The action must stand for trial.*⁹

GALLIARD, APPELLANT, v. LAXTON, RESPONDENT.

IN THE QUEEN'S BENCH, FEBRUARY 22, 1862.

[*Reported in 2 Best & Smith, 363.*]

THE judgment of the court was delivered by

WIGHTMAN, J.¹⁰ The first question proposed to us is of much general importance, inasmuch as it may arise in cases where resistance to an arrest may be carried to the extent of wounding or even killing the officer.

It appears that a warrant had been made by a magistrate for the county of Chester, directed "To the constable of the township of Nantwich, in the county of Chester, and all Her Majesty's officers of the peace in and for the said county;" commanding them or some or one of them forthwith to apprehend William Galliard, and convey him before two justices of the county of Chester, to answer for not obeying a bastardy order for payment of money. This order is stated to have been given to the superintendent of police, and by him to have been given to the police at Monks Copenhall in the county of Chester, (of which place William Galliard is stated in the warrant to be); and it had subsequently been in the possession of Dyson, one of the police constables who arrested William Galliard; but he had it not with him at the time he made the arrest, it being then at the station-house at Monks Copenhall, in the actual possession of the superintendent of police there.

¹ 64 Maine, 195.

² 9 Mass. 231.

³ 122 Mass. 445.

⁴ 23 Wend. 490.

⁵ 1 Denio, 574.

⁶ 7 Serg. & R. 386.

⁷ 10 Serg. & R. 249.

⁸ 2 Rawle, 139.

⁹ *Miller v. Callaway*, 32 Ark. 666; *Rodman v. Harcourt*, 4 B. Mon. 224, 229; *Patterson v. Miller*, 2 Met. (Ky.) 493; *Stubbs v. Lee*, 64 Me. 195; *Fowler v. Bebee*, 9 Mass. 231, 235; *Short v. Symmes*, 150 Mass. 298; *State v. Dierberger*, 90 Mo. 369, 375; *Brewster v. Hyde*, 7 N. H. 206; *Blake v. Sturtevant*, 12 N. H. 567, 572; *Green v. Burke*, 23 Wend. 490, 503-504; *People v. Hopson*, 1 Den. 574, 579; *People v. Nostrand*, 46 N. Y. 375; *Riddle v. Bedford*, 7 S. & R. 386, 392; *Venable v. Curd*, 2 Head, 582, 586; *Cummings v. Clark*, 15 Vt. 653 *Accord.* — Ed.

¹⁰ Only the opinion of the court is given. — Ed.

On the night of the 1st of July last, Dyson, with another police constable of the county, arrested William Galliard under the warrant, but did not produce it, nor were they asked to produce it; and the question is whether, to make the arrest legal, they must at the time have had the warrant with them, ready to have been produced if necessary.

The warrant is not addressed to any officer by name, but to the constable of Nantwich, and all the peace officers of the county generally, and this general form of direction seems to be warranted by the 5 G. 4, c. 18, s. 6, and Dyson and the other policeman both came within the description of the persons to whom it is addressed. We are not told what words were used by the officers at the time they made the arrest, but as no point seems to have been raised upon any omission to inform William Galliard of the nature of the charge, it may be presumed that they did tell him, not only that they arrested him under the warrant, but what the charge was. As they were obviously police constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest, but that as this was not a charge of felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced, if required, and that an arrest without such production would not be legal. The production of the warrant was not however required before or at the time that the arrest was made, notwithstanding the resistance of the appellant and his brother, nor indeed at any time; and as the warrant was in existence at the station-house, where no doubt it could readily have been procured, it may be said that there was no reason for its being in the hands or the pocket of one of the officers, and no disadvantage to the person arrested by reason of its not being there. That, no doubt, may be so under the circumstances which occurred in this case; but suppose it had happened that, after the arrest had been effected in spite of the resistance made, and before the appellant's brother had been taken to the station-house where the warrant was, he had requested the officers to produce it, which, not having it, they could not do, how would the case have stood then? We have already expressed our opinion that, if requested, the officers were bound to produce the warrant, and, if so, the keeping him in custody *after* such request and non-compliance would not be legal, and it could hardly be contended that the arrest itself would be legal, though the detention, under the circumstances above supposed, would be illegal; and in this view of the case it appears to us that the officers were bound to have the warrant ready to be produced if required, and that, if they had it not, the arrest would not be legal. If an action had been brought against the officers for making the arrest, and they had pleaded a plea of justification under the warrant, they must, according to all the precedents, have pleaded that it was delivered to them to be executed; and though it is not stated in the precedents that they had actual possession at the time of the arrest, it is to be presumed from the allegation of delivery to them,

that they continued to hold it. *Machalley's Case*¹ is distinguishable, on the ground suggested by Mr. East in his *Treatise on Pleas of the Crown*, vol. 1, p. 819, citing 1 Hale, P. C. 458; and, indeed, we are unable to find any case in which the precise point raised for our consideration has been decided: but we are, upon the whole, of opinion that the officers making the arrest ought to have had the warrant with them ready to be produced in case it should be required, and that, not having it, they were not justified in making the arrest.

*Conviction quashed.*²

DANIEL FIRESTONE v. W. J. RICE AND F. FENN.

IN THE SUPREME COURT, MICHIGAN, JULY 11, 1888.

[*Reported in 71 Michigan Reports, 377.*]

MORSE, J.* This suit was brought to recover damages for false imprisonment and assault and battery upon the plaintiff, alleged to have taken place on the night of August 6, 1885. Rice, at the time, was sheriff of Allegan County, and Fenn was night-watch of the village of Allegan. The arrest occurred in the township of Monterey, in that county. Upon the trial it appeared that Fenn was requested by the sheriff to aid him in the arrest, and did nothing except as ordered by the sheriff. The chief indignity complained of was the handcuffing of plaintiff. Fenn put the handcuffs upon him by direction of the sheriff, who had in his charge at the time one Zeigler, who was arrested at the same time and place as the plaintiff.

The court instructed the jury that if Fenn knew that Rice was sheriff, and acted in obedience to his orders, and only upon his orders, in what he did touching the arrest, he would be justified in so doing, even though the acts of Rice were without authority, and their verdict, as to Fenn, should be no cause of action.

"Under the laws of this State, a private citizen is bound, upon the order of the sheriff, to assist in the arrest, and he is not authorized to wait to ascertain the authority of the officer before acting; and unless his act in itself is in some way wanton, and beyond what he is required to do, and thereby a trespass is committed, he will not be liable, and for that reason I give you this request."

The jury rendered a verdict in favor of both defendants.

The plaintiff alleges error in the charge of the court as above given. There was no error in this direction. It is admitted that Fenn did nothing in wantonness or in malice. He went to the house of Zeigler,

¹ 9 Co. 65 b.

² *Reg. v. Chapmar*, 12 Cox C. C. 4; *Codd v. Cabe*, 1 Ex. D. 352; *Cabell v. Arnold*, (Texas, 1893) 22 S. W. R. 62 (reversed 23 S. W. R. 645) *Accord.* — Ed.

³ Only a part of the opinion of the court is given. — Ed.

where the arrest was made, at the request of the sheriff, and while there, under his direction, placed handcuffs upon plaintiff, and rode beside him in a buggy to Allegan. The court would have been warranted in directing a verdict in Fenn's favor.

The sheriff is authorized to call upon citizens to aid him in apprehending or securing any person for felony or breach of the peace;¹ and, if any person so required to assist the sheriff neglect or refuse to do so, he is liable to punishment by fine or imprisonment.²

We do not think that a man called upon by the sheriff is required, at his peril, to ascertain whether the sheriff has a proper warrant, or whether the offence charged against the person to be arrested is a felony, or that he may refuse to act until he is satisfied that the sheriff is acting legally, or within the scope of his office, in a criminal case. If he were allowed to do this, the object of the law would be defeated, and the statute rendered nugatory in many cases. There is often no time for inquiry, as action must be immediate. The necessity of the case will not permit the person thus summoned to stop to examine papers, or take counsel as to the legality of the process in the officer's hands, or to inquire whether any process is necessary in the particular case where his aid is required.

Therefore the person who responds to the call of one whom he knows to be an officer is protected by the call from being sued for rendering the requisite assistance. The officer may not be acting legally, and therefore a trespasser; but the person assisting him, at his request or command, and who relies upon his official character and call, is protected by the law, and must necessarily be, against suits for trespass and false imprisonment, if in his acts he confines himself to the order and direction of the sheriff. *McMahan v. Green*,³ *Reed v. Rice*.⁴

*Judgment affirmed.*⁵

¹ How. Stat. § 591.

² How. Stat. § 9250.

³ 33 Vt. 69.

⁴ 2 J. J. Marsh. 44.

⁵ *Elliot v. Besey*, Skin. 50, *per Saunders arguendo*; *Reed v. Rice*, 2 J. J. Marsh. 44; *McMahan v. Green*, 34 Vt. 69 *Accord*.

Oystead v. Shed, 12 Mass. 506, 511; *Elder v. Morrison*, 10 Wend. 128 *Contra*.

In *Elder v. Morrison*, *supra*, *Savage, C. J.*, said, p. 138: "Whenever a sheriff or constable has power to execute process in a particular manner, his authority is a justification to himself and all who come in his aid; but if his authority is not sufficient to justify him, neither can it justify those who aid him. He has no power to command others to do an unlawful act; they are not bound to obey, neither by the common law nor the statute, and if they do obey, it is at their peril. They are bound to obey when his commands are lawful, otherwise not. The only hardship in the case is, that they are bound to know the law. But that obligation is universal; ignorance is no excuse for any one." — ED.

B. v. SHERIFF OF MIDDLESEX.

IN THE COMMON PLEAS, EASTER TERM, 1488.

[Reported in Year-Book, 18 Edward IV., folio 4, placitum 4.]

Catesby came to the bar and showed how a *feri facias* was directed to the sheriff of Middlesex to make an execution for one J. on a judgment for J. against one B. ; and afterwards B. put all his goods into a chest sealed and locked. The sheriff broke the door of the house, and entered and carried off the goods. And whether the sheriff committed any tort.

LITTLETON, J., and all his companions held that the party might have a writ of trespass against the sheriff for breaking his house, notwithstanding the *feri facias*, for this writ shall not excuse him for breaking into the house, but only for the taking of the goods¹ &c. *Quod nota.*

SIR THOMAS KEMP v. WINDSOR.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1578.

[Reported in 4 Leonard, 41, placitum 111.]

SIR THOMAS KEMP was outlawed at the suit of one Windsor, who had against him four *capias ullagat*, and none of them were served, and afterwards he sued out a fifth *capias* : It was moved by *Mead*, that the said Sir Thomas keepeth open house, and yet the sheriff had not served the *capias*. *Dyer*. The sheriff may justify to break the house to take his body, and seize his goods for the queen,² for this process is in law at the suit of the queen ; but contrary where the process is sued at the suit of a subject : and the justices commanded Ford, prothonotary, to make a special *capias* for body and goods ; and a pain in the writ of £100 upon the sheriff to execute the writ accordingly.

¹ Bro. Ab. Execution, 100; Bro. Ab. Trespass, 390; Semayne's Case, 5 Rep. 91; Goudowin v. Lewis, 10 A. & E. 120; Percival v. Stump, 9 Ex. 167 (*semble*; see Duke v. Slowman, 8 C. B. 317) *Accord*.

But in this country the sheriff who wrongfully breaks the outer door is liable in trespass, not only for the entry, but also for the seizure of the goods. *Ilseley v. Nichols*, 12 Pick. 270; *Swain v. Mizner*, 8 Gray, 182; *Bailey v. Wright*, 39 Mich. 96; *Welch v. Wilson*, 34 Minn. 92 (*Mitchell, J., dissenting*); *Closson v. Morrison*, 47 N. H. 482, 485; *People v. Hubbard*, 24 Wend. 369, 4 Hill, 437. — Ed.

² Y. B. 13 Ed. IV., fol. 9, pl. 4; Semayne's Case, 5 Rep. 91; *Briggs's Case*, 1 Rolle, R. 336; *King v. Bird*, 2 Show. 87; *Burdett v. Abbot*, 14 East, 1, 157; *Launock v. Brown*, 2 B. & Al. 592; *Harvey v. Harvey*, 26 Ch. D. 644; *Kelsy v. Wright*, 1 Root, 83; *State v. Shaw*, 1 Root, 134; *State v. Smith*, 1 N. H. 346; *Bell v. Clap*, 10 Johns. 263 *Accord*.

Demand.—But a demand must be made before breaking open the door. *Semayne's Case*, 5 Rep. 91; *King v. Bird*, 2 Show. 87; *Launock v. Brown*, 2 B. & Al. 592; *Kelsy v. Wright*, 1 Root, 134; *State v. Smith*, 1 N. H. 346; *Bell v. Clap*, 10 Johns. 263. — Ed.

SEMAYNE v. GRESHAM.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1608.

[Reported in *Yelverton*, 28.¹]

GRESHAM and one Beresford were joint tenants of an house in London, in which house Beresford had several goods; and being indebted to Semayne, and judgment given against him for the debt, died possessed of the said goods, in the said house. Gresham continued possessed in the house by survivor; Semayne took execution for the goods of Beresford; the sheriff of London, taking with him a jury to praise the goods of the said Beresford, came to the said house to serve the execution; which Gresham perceiving, before the sheriff had entered the house, shut the door of the said house, and would not suffer the sheriff nor the jury to enter to view and praise the goods; whereupon Semayne brought an action on the case against Gresham for disturbing the said execution, and declared upon all the preceding matter. And (by FENNER and YELVERTON) the action does not lie; for Gresham has done nothing but what he may lawfully justify, viz., shut his own doors. And although the execution had been for the debt of Gresham, yet before the sheriff's entry into the house it had been lawful for him to shut the door; for, unless it was upon a *capias utlagatum*, which is the queen's suit, for the contempt of the party, it is not lawful for the sheriff to enter the house unless it is open;² as 18 E. 4, 4, is: *Concessum* by all the justices, contrary to the book 18 E. Execution. And also in this case (*per* FENNER) if the sheriff himself might have entered, yet it is not lawful to bring a jury into the house to praise the goods; for it was very inconvenient to have so large a company in an house, and might be prejudicial to the party, by the loss of the goods, &c. POPHAM, *contra*, because by this means justice is hindered; for execution is the effect of the whole suit; and if execution cannot be made, but is prevented by this means, then it will be in vain to sue: and therefore he conceived the book in 18 E. 2, Execution, is better law than 18 E. 4, and he was of opinion that upon an execution between party and party, the sheriff might enter and break the door; to which FENNER, Justice, answered, that if the sheriff might by law in such case break the house, then also clearly the action does not lie; for then, although Gresham shut the door of the house, it was the sheriff's fault that he did not break it. *Quod* YELVERTON granted afterwards. Trin. 2 Jac. Judgment was given against the plaintiff *per totam curiam*.

¹ 5 Rep. 91; Cro. El. 908; Moo. 668; Brownl. 50, s. c. — Ed.

² Malever v. Spink, Dy. 36, pl. 41; Foster v. Hill, 1 Bulst. 146; Parke v. Evans, Hob. 62; Cook's Case, Cro. Car. 537; Hopkins v. Nightingale, 1 Esp. 99; Kerbey v. Denbey, 1 M. & W. 336; Hodson v. Towning, 5 Dowl. P. C. 410; Whalley v. Williamson, 7 C. & P. 294; Duke v. Slowman, 8 C. B. 317; Snyder v. Brosse, 51 Ill.

BISCOP v. WHITE.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1600.

[Reported in *Croke, Elizabeth*, 759.]

TRESPASS for breaking his house. The defendant justifies his entry into the house by virtue of a warrant of the sheriffs upon a *feri facias* awarded to levy such a debt *de bonis et catallis quæ fuerunt Philip Biscop testatoris, tempore mortis in manibus Lucretiæ Biscop, his executrix*; and saith, that the executrix was in the plaintiff's house *cum bonis suis*, and there abided; and for that the door of the house stood open, he entered to levy that debt, &c. — It was thereupon demurred; and adjudged to be an ill bar, because he doth not allege that *bona testatoris* were in the house, but *bona propria executricis*,

357; *State v. Beckner*, (Ind. 1891) 26 N. E. R. 553; *Calvert v. Stone*, 10 B. Mon. 152 (but compare *Keith v. Johnston*, 1 Dana, 604); *Heminway v. Saxton*, 3 Mass. 222; *Oystead v. Shed*, 13 Mass. 520; *Isley v. Nichols*, 12 Pick. 270; *Swain v. Mizner*, 8 Gray, 182; *Welch v. Wilson*, 34 Minn. 92; *People v. Hubbard*, 24 Wend. 369; *State v. Armfield*, 2 Hawks. 246; *State v. Hooker*, 17 Vt. 658; *Hooker v. Smith*, 19 Vt. 151 *Accord*.

Douglass v. State, 6 Yerg. 525 (*semble*) *Contra*.

Compare *Fitz. Ab. Execution*, 152.

What is a Breaking. — The mere opening of a shut, though unlocked door, is a breaking within the doctrine of the principal case. 1 Roll. Ab. Distress (M) 1; Com. Dig. Execution (C. 5) (C. 12); *Boggs v. Vandyke*, 3 Harringt. 288; *Curtis v. Hubbard*, 1 Hill, 386, 4 Hill, 437. Compare *State v. Beckner*, (Ind. 1891) 26 N. E. R. 553.

But see, *contra*, *Ryan v. Shilcock*, 7 Ex. 72, 21 L. J. Ex. 55, s. c.; and compare *Nash v. Lucas*, L. R. 2 Q. B. 590, 593-4; *Crabtree v. Robinson*, 15 Q. B. D. 312, 314.

So is the simple opening of a window, *Nash v. Lucas*, L. R. 2 Q. B. 590, but not the elevation of a window already open, *Crabtree v. Robinson*, 15 Q. B. D. 312.

Dwelling-house. — An officer may in the execution of private process break into any building which is not occupied as a dwelling-house, *e. g.* a barn or store. *Penton v. Brown*, 1 Sid. 186; 1 Keb. 698, s. c.; *M'Gee v. Givan*, 4 Blackf. 16 (*semble*); *Platt v. Brown*, 16 Pick. 553; *Haggerty v. Wilber*, 16 Johns. 287; *Clark v. Wilson*, 14 R. I. 11; *Solinsky v. Lincoln Bank*, 85 Tenn. 368; *Fullerton v. Mack*, 2 Aik. 415; *Burton v. Wilkinson*, 18 Vt. 186. But a distrainer may not break even a detached barn or similar building. *Brown v. Glenn*, 16 Q. B. 254; *American Co. v. Hendry*, 37 Sol. J. 341.

Exceptions to General Rule. — The outer door may be broken in order to retake an escaped prisoner arrested in civil process. *Anon.*, 7 Mod. 8; *Anon.*, Loftt, 390; *Sandon v. Jarvis*, 3 E. B. & E. 935, 942.

Or in order to re-enter where the officer, after entering through an open door, has been forcibly ejected from the house. *Pugh v. Griffith*, 7 A. & E. 827; *Eagleton v. Guttridge*, 11 M. & W. 465; *Aga Kurboolie v. Queen*, 4 Moo. P. C. 239; *Bannister v. Hyde*, 2 E. & E. 627. See also *White v. Wiltshire*, Cro. Jac. 555, 1 Roll. R. 137, Palm, 53 s. c.; *Glover v. Whittenhall*, 6 Hill, 597.

Or, where the owner of a house has brought or received into his house the goods of another, with the design of shielding them from legal process. *Semayne's Case*, 5 Rep. 91; *De Graffenreid v. Mitchell*, 3 McC. 506. — Ed.

which were not liable to execution. But if *bona testatoris* had been there, it was conceived that the entry had been justifiable.¹ Wherefore it was adjudged for the plaintiff.

LEE v. GANSEL.

IN THE KING'S BENCH, JANUARY 25, 1774

[Reported in Cowper, 1.]

LORD MANSFIELD delivered the opinion of the court² as follows:—

This is an application on the part of General Gansel to be discharged out of custody on the following ground. That the process issued against him by this court has been abused, and his person illegally arrested; for that the officer *broke open* the *door* of his apartment which by law he could not do: therefore the court ought to discharge him, and put him in the same condition as before the arrest.

The case is this. Mr. Mayo was *owner* of this house, in which General Gansel had at the time in question, and for a long time before, taken the first floor, which consisted of two rooms, each of which had a door that opened upon the staircase; he had likewise up two pair of stairs, two rooms, each of which had a door that opened in the same manner: he had the use of the kitchen besides, and he rented these several apartments as a *lodger* from *year to year*, though that circumstance makes no difference. Mr. Mayo *lived* in the house; and, which is the *material* part of the case, there is but *one outer door* to the house; at which Mr. Mayo enters to go to his apartment, and Mr. Gansel to go to his. This is a fact concerning which there is no controversy. Mr. Gansel was up two pair of stairs in his bed-chamber, and as he says, the door was locked; and that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking. The question is, “Whether by law this door could be broken open.”

I should first state however, that the *outer door* of the *house* was *open*, and that the officers entered there legally. The question therefore turns upon the subsequent breaking open of the bed-chamber door.

The books talk of the *privilege* of a *mansion-house* and of the privilege of the *door* of it, which cannot be broken open. The whole question will therefore turn upon the *extent* of that which is called

¹ Cooke v. Birt, 5 Taunt. 765, 769, 771; Johnson v. Leigh, 6 Taunt. 246; M'Gee v. Givan, 4 Blackf. 16; Walker v. Fox, 2 Dana, 404 *Accord*.

But if the execution defendant is a resident in the house of a stranger, and not a mere guest, the entry of the officer through an open door is justifiable, even though there be no goods there subject to execution. Sheers v. Brooks, 2 H. Bl. 120; Moorish v. Murray, 13 M. & W. 52 (*semble*). — Ed.

² Only the opinion of the court is given, and that is slightly abridged. — Ed.

privilege. Now this rule of privilege, arising from a sound maxim of *policy*, is no privilege of a *debtor* properly speaking who absconds from justice in avoidance of legal process; but is annexed to the *house* and *door* (to which door I forbear at present to give any particular epithet) for the *protection* of a man and his family. It is therefore by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is this, "*that a greater evil should be avoided for a less, and that a less good should give way to a greater.*" The *outer* door therefore or window of a man's house, says the law, shall *not* be *broken* open by process. This has been long and well understood. The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken *strictly*, and not to be extended by any equitable analogous interpretation.

The oldest case to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the Year-Book 18 Ed. 4, page 4, pl. 19. "There, an action of trespass was brought for *breaking* the *outer* door in execution of a *feri facias*. The court held, that trespass would lie, for the officer shall *not break* open an *outer* door to execute his process: but when the officer had so got in, he *broke* open a *trunk*, and took out the goods that were in it; in respect of which they held, that trespass would not lie; for he had a right to break the trunk, and take the goods." I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to show, that the rule of privilege is taken most *rigidly*. Afterwards, in *Semaine's Case*,¹ the same strict doctrine was held, namely, "that breaking open the *outer* door was a trespass, but that taking away the goods was lawful." In *Yelverton*, Mich. 44, El. 29, which was the same case, Popham doubted whether *even* the *outer* door was privileged, because it would be a hindrance to justice; but afterwards, in Mich. 2 Jac. 5 Co. 92 b, 93 a, the whole court held, "that the *outer* door ought not to be *broken open*;" and grounded their opinion upon the single authority of 18 Ed. 4, p. 4, pl. 19, before quoted. You see from hence with what *rigor* the privilege has been construed in the oldest cases.

But no case or *dictum* has been cited at the bar, nor indeed did there ever exist a case, which intimated a doubt whether an *inner* door might *not* be *broken open*.² In Hob. 62 and 263, among other outrageous

¹ 5 Co. Mich. 2 Jac. p. 93.

² *King v. Bird*, 2 Show. 87; *Hutchinson v. Birch*, 4 Taunt. 619; *Lloyd v. Sandilands*, 8 Taunt. 250; *Prettyman v. Dean*, 2 Harringt. 494; *Stedman v. Crane*, 11 Met.

things the bailiff broke open a chamber door, having entered legally at the outer door; but such breaking was held lawful, the first entrance at the outer door, which was open, having been legal: and yet the latter was a very harsh case, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay stress on this to show how *strictly* the privilege has been understood, when the *outer* door or *window* is secure, and when the entrance has not been forcible through either of them, so as to lay open the house and its inhabitants to insult and violence from without; but on the contrary has been quiet and peaceable. In addition to these authorities, I recollect a note of a case lately determined, which says, "an *inner* door has no protection at all." It was the case of *Astley and Pindar*, and was heard in the year 1760, Mich. 1 Geo. 3. There, all the other charges against the bailiffs were answered, except breaking the *inner* door, which was accompanied with such violence, that the door fell, and the officer with it into the room: but all the court were of opinion, that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Besides these cases, and in conformity to the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is *Foster C. L.*, title *Homicide*, c. 8, sect. 20, which is this. "The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps further than in the scale of reason and sound policy they will warrant. But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any *extension*. It must, therefore, as I have before hinted, be confined to the breach of windows and of outer doors intended for the security of the house against persons from without, endeavoring to break in."

This brings the question to this point, "Whether this was the *outer* door to the *house* of the defendant? for the law, we have seen, does not privilege an *inner* door."

It has been said, that this lodging is an house, and has an outer door; and it has been likened to the case of chambers in the inns of court and in colleges, which have each an outer door that opens, like the door in question, upon the common staircase, and which, in cases of burglary, have been held to be the houses of the respective occupiers. The fact is, that from the nature of those buildings, they are all as *several* houses, and have *separate outer* doors which are the extremity of obstruction; because the *staircase* is no outer door. Again, they are enjoyed as separate property: In *Lincoln's Inn*, they have separate estates of inheritance; in the others, they have estates

295; *Stearns v. Vincent*, 50 Mich. 209; *Williams v. Spencer*, 5 Johns. 352; *Hubbard v. Mack*, 17 Johns. 127; *Hagar v. Danforth*, 20 Barb. 16; *Clark v. Wilson*, 14 R. I. 11, 12; *State v. Thackam*, 1 Bay, 358.

Nor is any demand necessary before breaking an inner door. *Hutchinson v. Birch*, 4 Taunt. 619 (qualifying *Ratcliffe v. Burton*, 3 B. & P. 223). — Ed.

for life, and in colleges as long as they reside. So, if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each, they will be separate houses, as Newcastle-house.¹

The distinction therefore can only be between several outer doors, and one outer door.

How far Lord Hale meant to carry his opinion in the passage that has been cited, it is difficult to say. Where a burglary is committed in the apartments of one who lodges in a house, the circumstance of the *owner's living* in it, or his occupying only a shop or cellar in which he does *not sleep*, makes a very material difference as to the form of the indictment; for in the latter case the *lodger* has the *outer* door entirely to himself; and the burglary in such case, must be laid to be in the house of the lodger; but it is otherwise in the former case, for there it must be laid to be in the house of the owner. And notwithstanding the greatness of Lord Hale's authority, it appears not clearly expressed, or perhaps not fully considered; at all events, we must not determine upon a single and uncertain *dictum*, against the many late and positive cases, grounded on the oldest decisions and most established principles.

But, if there were nothing more to confute the doctrine which has exhausted so much learning and ingenuity in support of it, the absurdity of the proposition would of itself be sufficient. And it is this, that whereas the *greatest house* in London has but *one* outer door; this gentleman having *four rooms* in one house, shall have *four* distinct *outer* doors. If any of them could be said to be an outer door, it must be the door of the lower rooms; but the truth is, they are *all inner* doors.

Therefore we are all most clearly of opinion, that by law, *this door was legally broken open*.

With regard to the point of relief, in case the arrest had been illegal, I give no opinion; though I think it would depend upon the behavior of the party applying. It is possible a person might come to ask that relief, under circumstances of such gross misbehavior as might induce the court to refuse it. Though the court, where a person is arrested who has been attending its process, will interpose, not only by punishing the officer, but by discharging the prisoner out of custody; yet cases of this sort are always matters of discretion with the court under their particular circumstances. But it is not necessary here to enter into that point; as we are all clearly of opinion that General Gansel was legally arrested; and, therefore, ought not to be discharged.

Per cur. Rule discharged.

¹ Swain v. Mizner, 8 Gray, 182; Stearns v. Vincent, 50 Mich. 209 *Accord.* — Ed.

SECTION VII.

Trespass ab initio.

1 NICHOLS, BRITTON, 137, 138.

1290.

WHERE any one, finding himself aggrieved by a wrongful detaining of his cattle or of his chattels, shall have obtained our writ to the sheriff, and found pledges to prosecute his plaint, let the sheriff immediately go or send some known bailiff to the place where the plaintiff says the distress is detained; and when the sheriff or his bailiff come there, let him demand a view of the beasts or chattels whereof the plaint is made. . . . If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villain of the deforcer, let him immediately raise the hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so.¹

ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1474.

[Reported in Year-Book, 13 Edward IV., folio 6, placitum 2.]

LITTLETON, J. If the beasts of a tenant are distrained, the mesne ought to release them, and put beasts of equal value of his own in their place. And he ought to do this regardless of the lord. And if the lord will not permit him to do so, then shall the first taking by the lord be tortious, for it is not taken according to the notion of a distress, any more than in the case where the lord puts the beasts on his plough.²

¹ In Y. B., 21 & 22 Ed. I. 106, goods distrained were replevied. "*Hertham*. Sir, why did you allow deliverance of the beasts to be made? Why did not you avow the ownership? *Hyham*. If we had avowed the ownership, he would have sued an appeal against us."

In Y. B., 32 & 33 Ed. I. in replevin for a cow against B., B. claimed that the cow was his. "*HOWARD, J.* You, who are plaintiff, will you sue in any other mode against A. [*B. ?*] *Malberthorp*. Nay, but if the court can allow the ownership to be tried in this writ, we will aver that the beast was ours, &c., and is, &c. *HOWARD, J.* The ownership cannot be tried in this writ; therefore the court adjudges, &c., that this beast be restored."

See further Y. B., 5 Ed. III. fol. 3, pl. 11, as explained in 3 Harv. L. Rev. 32; 30 Ed. III. fol. 9, pl. 8. — Ed.

² "And if the lord will not suffer the mesne in that case to take the cattle of the

DUNCOMB v. REEVE AND GREEN.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1601.

[Reported in *Croke, Elizabeth*, 783.]

TRESPASS, for the taking of certain raw hides. The defendant justifies as bailiff of Ipswich, by custom there, that if any butcher kills any beast within that town, and sells the flesh within the market, he is to pay twopence for every hide: and that the bailiffs may distrain the hide for the twopence, if it be denied; and so justifies for that, &c. The plaintiff replies, that after the distress the defendants tanned the hides, and so converted them to their use, &c. The defendants by rejoinder say, that they tanned them, because otherwise they would have rotted. And thereupon the plaintiff demurred. — THE COURT held it to be an ill plea: for the custom to distrain doth not enable them to tan; for that is tortious, because thereby the property is *quasi* altered, and the marks to know them are taken away from the owner, so as he cannot have them again. And although one may in some cases meddle with and use a distress, where it is for the owner's benefit, as POPHAM said; as where one distrains armor, he may cause them to be scoured to avoid rust; so if one distrains raw-cloth, he may cause it to be fulled, for it is for the owner's benefit. But here this tanning is not for his benefit; for it takes from him the notice of the thing, and so is a means of taking away the thing itself; for he cannot have any knowledge thereof to have it again.¹

tenant out of the pound, he is a trespasser *ab initio*; for he doth not use them according to the notion for distress; and thereto agree 13 Ed. IV. 6, 7 b.

"If he who has distrained detains the beasts after amends tendered before the impounding, he is a trespasser *ab initio*. 45 Ed. III., 9 b. *Contra*, Co. 8, Six Carpenters, 147." — Roll. Ab. Trespass *ab initio*.

Y. B. 45 Ed. III. fol. 9 b, pl. 13, supports Rolle. See also Y. B. 13 Hen. IV. fol. 17, pl. 14. — Ed.

¹ The sale of a distress makes the seller a trespasser *ab initio*. *Pledall v. Knapp*, 1 And. 65, pl. 139; *Cox v. Robertson*, 1 Bibb, 604.

So does a sale of the whole of a chattel under process against one of its co-owners. *Smyth v. Tankersley*, 20 Ala. 212; *Daniel v. Owens*, 70 Ala. 297 (*semble*); *Edgar v. Caldwell*, Morris, Iowa, 434; *Spalding v. Black*, 22 Kas. 55; *Moore v. Pennall*, 52 Me. 162; *Melville v. Brown*, 15 Mass. 82; *Walker v. Fitts*, 24 Pick. 191, 194; *Waddell v. Cook*, 2 Hill, 47; *Atkins v. Saxton*, 77 N. Y. 195, 200; *Ryder v. Gilbert*, 16 Hun, 163; *Snell v. Crowe*, 3 Utah, 27; *Ford v. Smith*, 27 Wis. 261. Or, indeed, any wrongful sale under execution. *Stephens v. Lawson*, 7 Blackf. 275; *Parish v. Wilhelm*, 63 N. C. 50; *Cressy v. Parks*, 76 Me. 532; *Wilson v. Ellis*, 28 Pa. 238; *Freeman v. Smith*, 30 Pa. 264; *Van Dresar v. King*, 34 Pa. 201; *Hall v. Ray*, 40 Vt. 576; *Wilson v. Blake*, 53 Vt. 305; *Buzzell v. Johnson*, 54 Vt. 90.

See also *Gibson's Case*, Lane, 90; *Walgrave v. Skinner*, Ow. 120, 2 Roll. Ab. 561, pl. 6, s. c.; *Barrett v. White*, 3 N. H. 210, for further instances of a subsequent conversion which made the original taking a trespass *ab initio*.

Subsequent conduct not amounting to a conversion of the chattel previously taken will not make the taker a trespasser *ab initio*. *Grill v. Hunter*, 40 Ala. 546; *Waterbury v. Lockwood*, 4 Day, 257; *Paul v. Slason*, 22 Vt. 221. — Ed.

OXLEY v. WATTS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1785.

[Reported in 1 Term Reports, 12.]

THIS was an action of trespass for taking a horse, tried before Lord Mansfield, at the last Summer Assizes, at Maidstone.

The defendant, as bailiff of Lord Dartmouth, lord of the manor of A., justified taking the said horse as an estray.

Replication, that after the taking mentioned in the declaration, the defendant worked the said horse, and so became a trespasser *ab initio*.

Erskine now moved to set aside the verdict, which had been obtained by the plaintiff, on the ground that this should have been *an action on the case* for the consequential damage, and not an action of *trespass*, because the original taking was admitted to be lawful.

But *per Curiam*, The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*.
*Rule refused.*¹

EDITH DE WACHEFORD v. WILLIAM NETEBEHT.

IN THE KING'S COURT, MICHAELMAS, 1233.

[Reported in 2 Bracton's Note Book, 632, Number 824.]

ON the Monday after St. Martin's, Edith de Wacheford offered herself in the court of Windsor against William Netebeht, and said that William, against the peace of God and of our lord the king, and his bailiffs, unjustly detained from her three pigs, which had disappeared without her consent [*addirati*], and thereupon she brings her suit to show that they were her pigs, raised by her, and that they had disappeared without her consent. And William was present, and denied the unjust detention against the said Edith and her suit, and said that those pigs were delivered to him with others to keep at pasture, and he denied that they had ever belonged to Edith, or were raised by her, or had disappeared without her consent, and he offered to prove that as the court should award. And Edith went out and sought counsel, and in truth said that William, against the peace of our lord the king, and his bailiffs as a thief had feloniously stolen the said pigs, one of which she

¹ Y. B. 18 Hen. VI. fol. 9 b, pl. 7; Y. B. 2 Ed. IV. fol. 5, pl. 9; Y. B. 22 Ed. IV. fol. 5, pl. 16; Y. B. 22 Ed. IV. fol. 47, pl. 12; *Dod v. Monger*, 6 Mod. 215, 216; *Gargrave v. Smith*, 1 Salk. 221; *Lawton v. Ward*, 1 Ld. Ray. 75; *Gates v. Bayley*, 2 Wils. 313 (*semble*); *Dye v. Leatherdale*, 3 Wils. 20; *Lamb v. Peck*, 8 Vt. 407; *Briggs v. Gleason*, 29 Vt. 78; *Collins v. Perkins*, 31 Vt. 624 *Accord.* — ED.

then held by her hand, and she was ready to prove this against him, as a woman against a thief, since he feloniously refused to give up her lawful chattels.¹

1 NICHOLS, BRITTON, 68.

1290.

WAIFS or estrays, not challenged within the year and day, shall belong to the lord of the franchise, if he be rightfully seised of such franchise; but if the lord did not cause the beast so found to be publicly cried in manner aforesaid, then no time shall run against the owner of the thing or beast, to bar him from replevying it whenever he pleases; and if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost [*adirree*] in form of trespass, or an appeal of larceny, by words of felony.²

¹ Compare the following from Bracton, fol. 150 b, who is speaking of one taken with the mainour after fresh pursuit: "The pursuer may at the outset proceed civilly or criminally at his option; for he may demand his chattel as having disappeared without his consent [*adiratam*] by the testimony of worthy men, and so obtain his chattel, although stolen. But if the one taken with the mainour will not comply with his demand, he may proceed further, and demand it as stolen, and say that he who has it is a thief, or can name the thief, and that he took it feloniously, by stealth and theft and against the peace of our lord the king, and by stealth carried it off, . . . and let the appellee defend the felony and larceny either by a jury or by his body, according to his election and the award of the court." — Ed.

² "No person can detain from another birds or beasts, *feræ nature*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays." — 1 Nichols, Britton, 215.

Y. B. 33 Hen. VI. fol. 26, pl. 12. "*Wangford*. I think that if I lose a box of charters touching lands to which I have no title, still I shall have an action of detinue. PRISOT, C. J. I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice. . . . *Littleton*. I think in Wangford's case he who lost the charters shall have detinue without any other title; as if I distrain for rent, and afterwards the termor offers me the rent and arrears, and I refuse to give up the distress, still he shall not have trespass against me, but detinue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters, it was lawful, and although he did not give them up on request, he shall not have trespass, but detinue against me, for no trespass is done yet; no more than where one delivers goods to me to keep and re-deliver to him, and I detain them, he shall never have trespass, but detinue against me *causa qua supra*; but perhaps if he burnt them, or broke the seals and the like, trespass would lie; *ad quod non fuit responsum*."

Y. B. 2 Rich. III. fol. 15, pl. 39. "It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detinue." — Ed.

EAST v. NEWMAN.

IN THE QUEEN'S BENCH, HILARY TERM, 1595.

[Reported in *Goldsborough*, 152, *placitum* 79.] .

EAST, executor of I. S., brought an action upon the case of finding and converting of certain goods, against Newman, and upon not guilty pleaded, the jury found this special verdict, viz. that the testator was possessed of divers goods, and them lost, and the defendant found them, and knowing them to be the goods of the testator, upon demand denied to deliver them; and if this denial was a conversion they prayed the discretion of the court. FENNER. I think that the denial is a conversion; for when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is.¹

HIGGINBOTHAM v. STODDARD.

IN THE KING'S BENCH, HILARY TERM, 1613.

[Reported in 2 *Rolls, Abridgment*, 563, *placitum* 14.]

If one makes his executors and dies, and the executors find among the goods of the testator an obligation whereby the testator was bound to J. D., and they, thinking the obligation was discharged, since the day of payment was passed, broke the seal, they are trespassers *ab initio*, although they came lawfully to that, that is by finding. Adjudged.²

BAGSHAWE v. GOWARD.

IN THE KING'S BENCH, HILARY TERM, 1606.

[Reported in *Croke, James*, 147.³]

TRESPASS for taking and carrying away a gelding. Plea, that defendant took it as an estray. Replication that the defendant labored the gelding, riding upon him and drawing with him. Demurrer.⁴

¹ "The reason of those who held the refusal [in *East v. Newman*] to be a conversion was that he came to the goods by finding, and the denial of them afterwards made him a trespasser *ab initio*, which cannot be law, this being only a nonfeasance." — *Per COKE*, in *Isaac v. Clark*, 1 *Roll. R.* 136. — Ed.

See also *Y. B. 7 Ed. IV. fol. 3, pl. 9*; *Gardener v. Campbell*, 15 *Johns.* 400, 401 (questioned in *Stoughton v. Mott*, 25 *Vt.* 668, 674). — Ed.

² But see *Taylor v. Jones*, 42 *N. H.* 25. — Ed.

³ 1 *Yelv.* 96, *Noy*, 119, s. c. — Ed.

⁴ The statement of the case is abridged. — Ed.

It was alleged, that this is a departure: for now it appears that the first seizure was lawful, and he brings the action for the abuse, which is matter subsequent at another day; so he ought to have brought the action for the *tort*, if he did any, for the offence the last day, and not for the taking, &c.; therefore the replication doth not maintain the declaration for the trespass alleged the first day: Also, the using of the estray by way of riding or drawing in a cart, being proper services for him, is no cause of action; because he who hath property may use it, so as he doth not misuse it: and he who hath an estray may for that cause use him; but then he must not demand anything for the meat of such an estray. But a distress may not be used, because he hath it by law only as a gage; and this case is not like to the abusing of a distress, or the exceeding of an authority in law; for there trespass lies *ab initio*, as 21 Edw. 7, pl. 22; 33 Hen. 6, pl. 26; 11 Hen. 4, pl. 75; 5 Hen. 7, pl. 10; 10 Edw. 4, pl. 2. But he who abuseth an authority *in fait* is not punishable in trespass, but by action on the case, for exceeding the authority given him; as 2 Edw. 4, pl. 4; 12 Edw. 4, pl. 8; 18 Edw. 4, pl. 27; 21 Edw. 4, pl. 75; and the abuse of the estray (he having a property) is the cause of the action upon the case; so this action *vi et armis* lies not. — But ALL THE COURT (POPHAM absent) held, that there is not any difference betwixt this case and the case of a distress; for he hath it by authority in law, wherefore he is punishable for the abuse by trespass as a trespasser *ab initio*.¹

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1500.

[Reported in Year-Book, 16 Henry VII., folio 2, placitum 7.]

TRESPASS *de bonis asportatis*, with force and arms. The defendant said by *Keble* that J. W. was possessed of the goods and sold them to the plaintiff, who left them in the possession of J. W. to the use of the plaintiff, and afterwards J. W. delivered the goods to the defendant to carry to Grocers' Hall in London, by force of which the defendant took them accordingly. Judgment, if action &c. *Fineux*. When one buys goods of me and leaves them in my possession, the property and possession is straightway in him, and for a detention afterwards trespass lies against me, *quod fuit negatum per totam curiam*, and likewise *a fortiori* against my bailee or vendee, *quod fuit etiam negatum*. For it was said where one obtains the possession of goods by lawful means through

¹ Weber v. Hartman, 7 Colo. 13; Barrett v. Lightfoot, 1 Mon. 241; Gibbs v. Chase, 10 Mass. 125, 128 (*semble*) Accord. — ED.

the immediate delivery of the plaintiff, one shall never be punished as a trespasser, but by a writ of detinue;¹ no more shall one's donee, vendee, or sub-bailee who comes to the plaintiff's goods by a mesne.² But if one takes them by his own wrong out of the possession of the immediate bailee of the owner, he shall be punished as a trespasser; and so a diversity.

THE SIX CARPENTEES' CASE.

IN THE KING'S BENCH, MICHAELMAS TERM, 1610.

[Reported in 8 Coke, 146 a.]

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles *extra* Cripplegate, in the ward of Cripplegate, &c., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house, said, that the said house *præd' tempore quo, &c., et diu antea et postea*, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, &c., by force whereof the defendants, *præd' tempore quo, &c., viz., hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, &c. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d., and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or non-payment, which is all one (for every non-payment upon request, is a denying in law), makes the entry into the tavern tortious.

And, first, it was resolved when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a tres-

¹ Y. B. 34 Hen. VI. fol. 5, pl. 15; Y. B. 13 Edw. IV. fol. 9, pl. 5; Y. B. 18 Edw. IV. fol. 27, pl. 23; Anon. Moore, 248; Fenn v. Bittleston, 7 Ex. 150; *Ex pa te* Chamberlain, 1 Sch. & Lef. 320, 322; Bradley v. Davis, 14 Me. 44; Chapman v. Andrews, 3 Wend. 240.

On the same principle, a bailee of goods who wrongfully converts them to his own use is not guilty of larceny. King v. Meeres, 1 Show. 50. — Ed.

² Y. B. 2 Edw. IV. fol. 5, pl. 9; Y. B. 21 Hen. VII. fol. 39, pl. 49; Bradley v. Davis, 14 Me. 44; Marshall v. Davis, 1 Wend. 109. — Ed.

passer *ab initio*: but where an entry, authority, or license, is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is, that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. *Vide* 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. *Vide* 12 E. 4, 8 b. 21 E. 4, 19 b. 5 H. 7, 11 a. 9 H. 6, 29 b. 11 H. 4, 75 b. 3 H. 7, 15 b. 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these, and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful: but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus*.

2. It was resolved *per totam curiam*, that not doing, cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass;¹ and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, &c., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. *temp.* E. 1. Replevin 27. 27 E. 3, 88. 45 E. 3, 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 Edw. 4, 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put, is

¹ *Averill v. Smith*, 17 Wall. 82, 90; *Hinks v. Hinks*, 46 Me. 423; *Flinn v. Symonds*, 11 N. H. 363 *Accord.* — Ed.

not law, for it is no trespass, but the taverner shall have an action of debt: and there before Brian held, that if I bring cloth to a tailor, to have a gown made, if the price be not agreed in certain before, how much I shall pay for the making, he shall not have an action of debt against me; which is meant of a general action of debt: but the tailor in such a case shall have a special action of debt: *scil.* that A. did put cloth to him to make a gown thereof for the said A., and that A. would pay him as much for making, and all necessities thereto, as he should deserve, and that for making thereof, and all necessities thereto, he deserves so much, for which he brings his action of debt: in that case, the putting of his cloth to the tailor to be made into a gown, is sufficient evidence to prove the said special contract, for the law implies it: and if the tailor overvalues the making, or the necessities to it, the jury may mitigate it, and the plaintiff shall recover so much as they shall find, and shall be barred for the residue. But if the tailor (as they use) makes a bill, and he himself values the making and the necessities thereof, he shall not have an action of debt for his own value, and declare of a retainer of him to make a gown, &c., for so much, unless it is so especially agreed. But in such case he may detain the garment until he is paid, as the hostler may the horse. *Vide* Br. Distress 70, and all this was resolved by the court. *Vide* the book in 30 Ass. pl. 38, John Matrever's case, it is held by the court, that if the lord or his bailiff comes to distrain, and before the distress the tenant tenders the arrears upon the land, there the distress taken for it is tortious. The same law for damage-feasant, if before the distress he tenders sufficient amends; and therewith agrees 7 E. 3, 8 b, in the Mr. of St. Mark's case; and so is the opinion of Hull to be understood in 13 H. 4, 17 b, which opinion is not well abridged in title Trespass, 180. Note, reader, this difference that tender upon the land before the distress, makes the distress tortious; tender after the distress, and before the impounding, makes the detainer, and not the taking wrongful: tender after the impounding, makes neither the one nor the other wrongful; for then it comes too late, because then the cause is put to the trial of the law, to be there determined. But after the law has determined it, and the avowant has return irreplevisable, yet if the plaintiff makes him a sufficient tender, he may have an action of *detinue* for the detainer after; or he may, upon satisfaction made in court, have a writ for the re-delivery of his goods; and therewith agree the said books in 13 H. 4, 17 b; 14 H. 4, 4; *Registr' Judic'*, 37; 45 E. 3, 9, and all the books before. *Vide* 14 Ed. 4, 4 b; 2 H. 6, 12; 22 Hen. 6, 57; Doctor and Student, lib. 2, cap. 27; Br. Distress, 72, and Pilkington's case, in the fifth part of my Reports, fol. 76, and so all the books which *prima facie* seem to disagree, are upon full and pregnant reason well reconciled and agreed.

NANCY MALCOM v. ELIJAH K. SPOOR.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1847.

[Reported in 12 Metcalf, 279.]

SHAW, C. J. This was an action of trespass, in which the plaintiff declared against the defendant for breaking and entering her house, &c. The defendant justified under a writ directed to him, as constable, and commanding him to attach the plaintiff's household furniture.

The case comes before us on exceptions, from which it appears that the defendant was a constable, and that he entered the plaintiff's house, having a writ against her, and attached her furniture; that he took with him into the house a man who was intoxicated, whom he made keeper of the attached furniture, and left in the house, in charge of the furniture, although the plaintiff objected to his remaining there as keeper, on account of his intoxication.

The exceptions also set forth the violent conduct of the keeper; and other matters, which are not material to the decisions of the question that is brought before us.

The Court of Common Pleas, in which the trial was had, instructed the jury, that if the defendant, under color of his process, took with him a grossly intoxicated and clearly unfit person into the plaintiff's house, and left him therein as keeper, this was such an abuse of his authority as made him a trespasser *ab initio*; and that the defendant was answerable for all the acts of such keeper, done in pursuance of previous concert between them, or by direction of the defendant. A verdict was returned for the plaintiff, and the question whether these instructions were right, has been submitted to us without argument.

It has been held as a rule of the common law, ever since the Six Carpenters' Case,¹ that where one is acting under an authority conferred by law, an abuse of his authority renders him a trespasser *ab initio*. Melville v. Brown.² In the case before us, the defendant had authority by law to enter the plaintiff's house, to serve legal process; but placing there an unfit and unsuitable person, to keep possession of the attached goods, in his behalf, until he could remove them, against the remonstrance of the plaintiff, was an abuse of his authority, which rendered him liable as a trespasser *ab initio*.

An officer cannot legally stay in another's building, to keep attached goods therein, nor authorize any other person to remain therein, as keeper, for a longer time than is reasonably necessary to enable him to remove the goods, unless he has the consent, express or implied, of the owner of the building, without rendering himself liable as a trespasser. See Rowley v. Rice.³ *Exceptions overruled.*⁴

¹ 8 Co. 146.² 15 Mass. 82.³ 11 Met. 337.⁴ Y. B. 11 Hen. IV. fol. 75, pl. 16; Y. B. 22 Ed. IV. fol. 5, pl. 16; Ward's Case, Clayt. 44, pl. 76; Juchter v. Boehm, 67 Ga. 534; Williams v. Powell, 101 Mass. 467; Davis

JEWELL v. MAHOOD.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JUNE, 1863:

[Reported in 44 New Hampshire Reports, 474.]

TRESPASS *quare clausum*. James Hall and Margaret Hall conveyed the premises to the plaintiff by a deed containing the following reservation:

"We, the said James Hall and Margaret Hall, reserving all the wood and timber on said lot, and are to have the privilege of entering upon said lot of land, and removing said wood and timber at any and all times, for the next five years ensuing from the date of this instrument."

Within said five years the defendant entered under the right of said Hall, and removed the wood. The plaintiff's cause of action was, and he offered evidence, that the defendant, having the right to enter to cut and remove the wood, in doing so did not put up the bars, whereby cattle entered and ate the plaintiff's oats; that he did not confine himself to one path, and threw some of the wood into the plaintiff's grass, and suffered it to remain there some time; that he put some of the wood into a low place, to make a causeway to draw the wood over.

The plaintiff claimed that the defendant, by abuse of his right, and by excess, was liable as a trespasser *ab initio*.

The court rejected the evidence, and ordered a nonsuit, and the plaintiff excepted, and the questions of law were reserved.

Little, for the plaintiff.

Cilley, for the defendant.

SARGENT, J. When the plaintiff in this case accepted the deed from James and Margaret Hall of the land in question, with the reservation specified, it was the same as though he had owned the land before, and had conveyed to said Halls the right to enter said premises during the time and for the purposes specified in the reservation. The defendant entered under an express authority; an authority in fact, and not one conferred or implied by law. It is well settled that where a man abuses an authority in law, by committing acts which are in themselves trespasses, not authorized by the authority, the party is a trespasser *ab initio*; but that when there is an authority in fact, and a party exceeds that authority, he is only liable for the excess. Six Carpenters' Case; Allen v. Crofoot; Cushing v. Adams;¹ Wendell v.

v. Stone, 120 Mass. 228; Cutter v. Howe, 122 Mass. 541, 544; Hazard v. Israel, 1 Binn. 240; Kissecker v. Monn, 36 Pa. 313; Snell v. Crowe, 3 Utah, 26 Accord.

Compare Page v. Depuy, 40 Ill. 506; Dwinnells v. Boynton, 3 All. 310; Adams v. Rivers, 11 Barb. 390; Taylor v. Jones, 42 N. H. 25, in which cases the subsequent misconduct was not thought sufficiently grave to make the original entry a trespass *ab initio*. — ED.

¹ 18 Pick. 114.

Johnson;¹ *Ferrin v. Symonds*;² *State v. Moore*.³ In this case the gist of the action is the breaking and entering the plaintiff's close; the other circumstances are only stated as affecting the damages. But the defendant is not liable for breaking and entering, because he had the right to enter, and in this form of action if the breaking and entering is not made out the action fails. If the plaintiff would recover damages for any of the acts done after entry, he must bring case or trespass in some other form, and not trespass *quare clausum fregit*.

*Judgment on the verdict.*⁴

ALLEN v. CROFOOT.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1830.

[Reported in 5 *Wendell*, 506.]

ERROR from the Cortland Common Pleas. Crofoot sued Allen in a justice's court, and declared against him in *trespass* for entering his house in his absence and obtaining copies of papers for the purpose of commencing a suit against him. The defendant pleaded the general issue and license to enter the house. The court charged the jury, that if they should be of opinion that the defendant had acted unfairly or improperly in obtaining copies of the papers, and had gone to the plaintiff's house with the intention of fraudulently obtaining such copies, though he had leave to enter the house, they should find for the plaintiff; but if he acted correctly and openly, and had leave to enter the house, they should find for the defendant. The defendant excepted to this charge, and the jury found a verdict for the plaintiff with \$75 damages. The defendant sued out a writ of error.⁵

J. A. Spencer, for plaintiff in error.

Greene C. Bronson, (attorney-general,) for defendant in error.

By the Court, SAVAGE, Ch. J. It is urged by the plaintiff in error, that the court below erred in charging the jury that the action was sustainable, if they should find that the defendant entered the plaintiff's house fraudulently, to obtain improperly copies of papers in the absence of the plaintiff. It was decided in *The Six Carpenters' Case* that where an authority to enter upon the premises of another is given by law, and it is subsequently abused, the party becomes a trespasser *ab*

¹ 8 N. H. 220.

² 11 N. H. 363.

³ 12 N. H. 42.

⁴ *Ballard v. Noaks*, 2 Ark. 45; *Hunnewell v. Hobart*, 42 Me. 565; *Dingley v. Buffum*, 57 Me. 379; *Cushing v. Adams*, 18 Pick. 110; *Smith v. Pierce*, 110 Mass. 35; *Hubbard v. Kansas Co.*, 63 Mo. 68; *Wendell v. Johnson*, 8 N. H. 220; *Dumont v. Smith*, 4 Den. 319; *Boults v. Mitchell*, 15 Pa. 371; *Edelman v. Yeakel*, 27 Pa. 26; *Narehood v. Wilhelm*, 69 Pa. 64; *Stone v. Knapp*, 29 Vt. 501 *Accord*. — Ed.

⁵ The statement is abridged, and the arguments and a part of the opinion are omitted. — Ed.

initio ; but where such authority or license is given *by the party*, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser ; and the reason of the difference is said to be, that in case of a license by law, the subsequent tortious act shows *quo animo* he entered ; and having entered with an intent to abuse the authority given by law, the entry is unlawful ; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is not necessary to inquire. A better reason is given for it in Bacon's Abr. tit. Trespass, B. Where the law has given an authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man, who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not fit to be trusted therewith. It is contended that the license, being obtained by fraud, was void. The defendant knocked at the door, and was told to walk in ; he was found copying certain papers ; but how he obtained them, on what representation, or from whom, the evidence does not disclose. One witness does indeed testify that he said he would not have got the copies, if he had not practised a deception on the wife and brother-in-law of the plaintiff. If this declaration should be considered evidence of his having made improper representations to obtain the papers, then the question arises, Does he thereby become a trespasser *ab initio* ?

It has been decided that to enter a dwelling-house without license, is in law a trespass,¹ and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place ;² and it is argued that as fraud vitiates everything into which it enters, a license to enter the house fraudulently obtained is void, and is *no license*. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it farther than to cases where the person enters under a license given him *by law*. In such cases, as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

The judgment must be reversed, without costs, and a *venire de novo* awarded by Cortland Common Pleas.

¹ 12 Johns. R. 408.

² 15 Johns. R. 186.

CAROLINE ESTY v. JOHN S. WILMOT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1860.

[Reported in 15 Gray, 168.]

ACTION of tort for assault and battery. Trial and verdict for the plaintiff in the Superior Court in Middlesex, at September term 1859, before Vose, J., who signed this bill of exceptions: —

“There was evidence tending to prove that the plaintiff was an operative in one of the mills in Lowell, and the defendant had charge of the section of the room where the plaintiff worked.¹

“The court ruled, and charged the jury, that if the plaintiff had been disorderly, and had committed any act affecting the discipline and good order of the room, or the success of the work carried on in the room, or creating disturbance in the room, the defendant had a right, under the direction of the overseer, to order her out, and, on her refusal to go, to use a sufficient and proper force to eject her from the premises; and if during the process of ejecting her from the room he used unnecessary and improper force and violence towards her, he thereby became a trespasser *ab initio*, and would be liable for all his acts.

“The defendant did not object to this part of the charge at the time it was given, and asked for no instructions as to the extent of the liability of the defendant on account of any excessive force used by him. The defendant, feeling aggrieved by the above ruling, excepts thereto.”

W. P. Webster, for the defendant.

D. S. Richardson and *G. F. Richardson*, for the plaintiff.

HOAR, J. The distinction made in the Six Carpenters' Case, that “when an entry, authority or license is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*,” has been frequently recognized and applied in this Commonwealth, and is a familiar one. It is most commonly applied in cases of trespass to real estate where the original entry could not be resisted, being independent of the will or consent of the owner. It is also applicable in the case of officers serving legal process. The reason for the distinction, most commonly approved by modern text writers and judicial decisions, is this; that an officer or other person acting by authority of law shall not be allowed to avail himself of it as an instrument of oppression. As the citizen is bound to submit to it without resistance, and has no opportunity to make provisions or stipulations for his own

¹ The statement is abridged, and the argument for the plaintiff is omitted. — ED.

security, the exercise of the legal power is made conditional upon pursuing it wholly within legal limits. The abuse is held to be a forfeiture of the whole protection which the law gives to the act which it allowed. *Bac. Ab. Trespass, B. State v. Moore.*¹ 1 *Smith's Lead. Cas.* (5th Am. ed.) 216-221. *Allen v. Crofoot.*

But the abuse of the authority of law, which makes a man a trespasser *ab initio*, is the abuse of some special and particular authority given by law, and has no reference to the general rules which make all acts lawful which the law does not forbid. And we are of opinion that the instruction given to the jury in the case now before us was erroneous, because the defendant was not in the exercise of any authority conferred by law, within the meaning of the rule in the *Six Carpenters' Case*, when he committed the assault complained of. He had the legal right to use the kind and degree of force necessary and appropriate to protect his person, and his employers' property, from the disorder and misconduct of the plaintiff. But the parties stood on equal terms in this respect. Their relation to each other was created by contract, and the right of the defendant to remove the plaintiff from the room for misbehavior was an incident to that relation.

The instruction given to the jury obviously extended to the whole grounds of defence, and was not of such a casual or incidental nature that the defendant was in fault for not calling attention to its inaccuracy before the jury retired.

*Exceptions sustained.*²

THE STATE v. MOORE.

IN THE SUPREME JUDICIAL COURT, NEW HAMPSHIRE, JULY, 1841.

[Reported in 12 *New Hampshire Reports*, 42.]

INDICTMENT for breaking and entering the house of Isaac Paddleford, at Lyman, in the night time, on the 19th day of November, 1840, with intent to steal, and stealing therefrom certain pieces of money.

GILCHRIST, J. A question of more difficulty is presented by the second objection. It is said, that as the prisoner was lawfully in the house, he cannot be convicted of the offence of entering in the night time with intent to steal.

The prisoner had a right to enter the inn, and the bar-room; and the question arises, whether the larceny committed in the bar-room can relate back, and give a character to the entry into the house, so as to make it criminal, and the prisoner punishable for it, upon reasoning similar to that which, in a civil action, would render him liable as a trespasser *ab initio*? Except the inference that may lawfully be made from the act of larceny, there is no evidence that he entered with any illegal purpose, or a felonious intent.

¹ 12 N. H. 42.

² *Turner v. Footman*, 71 Me. 218 *Accord.*

See also *Johnson v. Hannahan*, 1 Strob. 313, with the dissenting opinion by O'NEALL, J. — ED.

The existence of a distinction between the consequences of an abuse of an authority in law, and the abuse of an authority in fact, is well settled. In the former case, the party is a trespasser *ab initio*; in the latter, he is liable only for the actual tortious act. Different reasons have been given for the distinction, and it is important to determine what the reason actually is, in order to ascertain whether the principle of holding one a trespasser *ab initio*, be applicable in criminal cases.

In the Six Carpenters' Case, the reason is said to be, "that in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for, *acta exteriora indicant interiora secreta*. But when the party gives an authority or license himself, he cannot for any subsequent cause punish that which is done by his own authority or license."

What is offered here as a reason for the distinction, is hardly more than a statement that such a distinction exists. And in the case of *Allen v. Crofoot*, Savage, C. J., intimates that it is a distinction without a difference of principle. He proceeds to say that a better reason is given for it, in *Bac. Abr.*, Trespass B. "Where the law has given an authority, it is reasonable that it should make void everything done by an abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority, does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because, it was the man's folly to trust another with an authority who was not fit to be trusted therewith."

Even here, however, it is not stated *why* it is reasonable that the law should make void everything done by an abuse of an authority.

A much more sensible reason for the distinction is given in *Hammond's Nisi Prius*, 59. He observes, that the reason given by Coke "cannot be the true reason of the rule, because, if the nature of the subsequent act of trespass was indicative of a previous evil intent, it must be so, not only in the instance where it has been perpetrated in executing an authority in law, but likewise where it has been committed in fulfilling an authority in fact. The ground, therefore, upon which one who has been guilty of an abuse is made a trespasser *ab initio*, is (for there is no other), that of policy, and the rule was instituted to prevent an authority in law being turned into an instrument of injustice and oppression." And *Richardson, C. J.*, says, in the case of *Barrett v. White & a.*,¹ that it would be contrary to sound public policy to permit a man to justify himself at all under a license or authority allowed him by law, after he had abused it, and used it for improper purposes. The presumption of law is, that he who thus abuses such an authority, assumed the exercise of it in the first place for the purpose of abusing it. The abuse is, therefore, held to be a forfeiture of all the protection which the law would otherwise give.

But where the authority is derived from an individual, and the authority is abused, the party becomes a trespasser for the excess only; "for the necessity and policy which, in the instance where an authority in law has been abused, operate to invalidate the proceedings from the commencement, no longer exist." *Hammond's Nisi Prius*, 66.

These remarks seem to us a sensible exposition of the reason of the distinction. Where the law invests a person with authority to do an act, the conse-

¹ 3 N. H. Rep. 227.

quences of an abuse of that authority by the party, should be severe enough to deter all persons from such an abuse.

But has this "policy of the law" ever been extended to criminal cases? We are not aware that it has. It is true that, in order to ascertain the intent of the accused, the law often regards the nature of the act committed. But this is generally such an act as could not have been committed with any other than a criminal purpose. Thus, the act of secretly taking the property of another, necessarily raises the presumption that the party intended to steal, and this presumption stands until explained by other evidence. In an indictment for breaking, &c., with intent to commit a felony, the actual commission is so strong a presumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in the indictment. But where one lawfully enters a house, it by no means follows, that because he steals, while there, he entered with that purpose. The act of stealing is evidence of the intent to steal; but is hardly sufficient to rebut the presumption that where he lawfully entered, he entered for a lawful purpose. To hold that, for a lawful entry, a party could be punished, because, after such entry, he does an unlawful act, would be to find him guilty of a crime by construction; a result which the law, in its endeavors always to ascertain the real intention of the accused, invariably, in theory, avoids, and which has seldom, in modern times, happened in practice.

A case is put by Lord Hale, the reasoning of which is analogous to that we have used in this case. "It is not a burglarious breaking and entry, if a guest at an inn open his own chamber door, and takes and carries away his host's goods, *for he has a right to open his own door*, and so not a burglarious breaking." 1 Hale P. C. 553, 554.

If a burglary could not be committed because the party had a right to open his own door, notwithstanding the subsequent larceny, the same principle would seem to be applicable here, where the prisoner had a right to enter the house, and where, by parity of reasoning, his subsequent larceny would not make his original entry unlawful.

For these reasons, the judgment of the court is, that the verdict be set aside and a

*New trial granted.*¹

REPLEVIN AGAINST A TRESPASSER AB INITIO. — The origin of trespass *ab initio* in the case of chattels has been so completely lost sight of that in modern times replevin has been allowed against a trespasser *ab initio*. *Hopkins v. Hopkins*, 10 Johns. 369. — ED.

¹ *Commonwealth v. Tobin*, 108 Mass. 426 *Accord.* — ED.

CHAPTER II.

DISSEISIN AND CONVERSION.

SECTION I.

Disseisin.

BRACTON, fol. 161 b, Twiss's Translation, 3 Tw. Br. 17. Likewise a disseisin takes place, not only if any one ejects the true owner when present, or his agent, or his family, or does not admit him, or repels him on his return from market or from a journey, but he also effects a disseisin, if he shall not permit the owner or his agent or his family being in possession to make use of it, or at least hinders him from making a convenient use of it. And in which case, although he does not altogether expel [the owner], nevertheless he inflicts upon him a disseisin, since he takes away from him altogether the convenience of using it, or hinders him from using it conveniently, quietly, and in peace, by disquieting and disturbing his possession. Likewise a disseisin takes place not only according to what has been said above, but also if any person of greater power wishes to make use of the tenement of another against the will of the tenant, by ploughing, or by digging, by reaping and carrying away, contending that the tenement, which is another's, is his own; but if he has made no claim to the tenement, it will be another thing, because then there will be a trespass, and not a disseisin from a freehold.¹

LITTLETON, § 279. And note that disseisin is properly, where a man entereth into any lands or tenements where his entry is not congeable, and ousteth him which hath the freehold, &c.

COKE, 2d Inst. 414. By the common law a man that is in seisin of his land may have an assise, for that he is disseised of the quiet enjoying of his land; as when the lord, or any other that hath a rent, and oftentimes distraineth for the rent, where none is behind, the tenant shall have an assise of novel disseisin of the land, for that, by reason of the *frequentie* of distresses, he is disseised of the quiet enjoying of his land, and cannot make his advantage thereof, and *frequentia mutat transgressionem in disseisinam*.

¹ "Et si eo animo forte ingreditur fundum alienum, non quod sibi usurpet tenementum vel jura, non facit disseysinam sed transgressionem." (Bracton, fol. 216 b). See also 1 Nich. Britton, 272, 343. — ED.

WILLELMUS DE ESTRE *v.* ROGERUM DE SANCTO
DIONISIO.

IN THE KING'S COURT, HILARY TERM. 1230.

[*Reported in 2 Bracton's Note Book, placitum 378.*]

ROGERUS DE SANCTO DIONISIO et Sarra uxor eius athachiati fuerunt ad respondendum Willelmo de Estre quare contra pacem et dignitatem domini Regis arrauerunt et sulcauerunt et foderunt pasturam suam de Ekeles unde idem Willelmus queritur quod propter hoc deterioratus est et dampnum habet ad ualenciam etc.

Et Rogerus et Sarra ueniunt et defendunt quod nichil arrauerunt nec sulcauerunt nec foderunt de pastura uel terra ipsius Willelmi, et dicunt quod pastura illa ipsorum est et non ipsius Willelmi. Et quia ipsi Rogerus et Sarra aduocant terram illam ut suam et pasturam, et idem Willelmus ut suam, Consideratum est quod ipsi Rogerus et Sarra inde sine die et Willelmus perquirat sibi per breue de noua disseisina si uoluerit.¹

ANONYMOUS.

IN THE COMMON PLEAS. TRINITY TERM, 1340.

[*Reported in Year Book 14 Edward III., Rolls Series, 230, placitum 20.*]

TRESPASS against bailiffs of Ancient Demesne, in which after the record had been, for a cause, removed into the Bench, the bailiffs continued to hold the plea, notwithstanding the removal, until the tenant who now brings this writ lost the land. The bailiffs abode judgment whether the present plaintiff ought to be answered as to this plaint, inasmuch as he showed that it was a disseisin effected on him, wherefore he might recover by novel disseisin both the freehold and damages, as appears above in Easter Term in the 12th year. And afterwards they departed in contempt of court, whereupon the plaintiff prayed judgment for himself. And the matter was pending until now. SCHARSHULLE rehearsed as above, and said: "Even had the bailiffs abode judgment, there is no ground upon which to give judgment for them; but since they have departed in contempt of the court, it seems to us that judgment shall be given against them. Therefore the court adjudges that

¹ Professor Maitland adds in a note to this case: "The time is not yet when title shall be tried in an action of trespass *vi et armis*; but this is a noteworthy attempt."

There are several reported cases of the thirteenth century in which, as in the principal case, the plaintiff failed in trespass, because the defendant's entry was under a claim of right to the freehold; *i. e.*, was a disseisin. [1253] Plac. Ab. 132, col. 2, rot. 13, Essex; [1253] Plac. Ab. 142, col. 1, rot. 9, Lanc.; [1272] Plac. Ab. 262, col. 1, rot. 18, Cant.; [1272] Plac. Ab. 262, col. 1, rot. 19, Essex. — Ed.

they be taken for the contempt, and that the plaintiff do recover his damages according to his count."¹

ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1352.

[Reported in *Liber Assisarum*, 26 Edward III., placitum 17.]

It was found by verdict of the Assise of Novel Disseisin that the plaintiff had cut trees on his own soil, and the tenant, who had common there, said that the soil was his soil, and ordered the plaintiff not to cut any trees, whereupon the plaintiff departed, and now brings the assise.

SHARESHULL, C. J., said that he who had no right cannot be seised of a freehold by words. But if one having a right of entry was disturbed, as he was coming to the land, from entering, it is a disseisin. Wherefore the plaintiff took nothing.

PLOT'S CASE.

IN THE COMMON PLEAS, EASTER TERM, 1618.

[Reported in 9 *Viner's Abridgment*, 85, placitum 5.]

If a man hath an house and locks it, and departs, and another comes to his house, and takes the key of the door into his hand, and says that he claims the house to himself in fee without any entry into the house, this is a disseisin of the house. Admitted clearly upon evidence at the bar in an assize taken by default.

¹ See also Y. B. 11 & 12 Ed. III. (Rolls Series), 503, 505.

After the decision in the principal case the distinction between a trespass and a disseisin lost its value for the purpose of the action trespass *quare clausum fregit*. The distinction, however, is one founded in the nature of things, and still plays a prominent part in our law. Thus, a mere trespasser never gains a title by lapse of time. The wrong-doer must be also an adverse possessor, in other words a disseisor. This substitution of the term "adverse possession" for disseisin is one of the curiosities of our legal terminology. — ED.

SECTION II.

Conversion.

(a) NONFEASANCE.

MULGRAVE v. OGDEN.

IN THE QUEEN'S BENCH, HILARY TERM, 1591.

[Reported in *Croke, Elizabeth*, 219.]

ACTION SUR TROVER of twenty barrels of butter; and counts that he *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices, that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment, and suffers it to be moth-eaten; or if one find a horse and giveth it no sustenance; but if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, &c.; but for negligent keeping no law punisheth him. *Et adjournatur*.¹

ROSS v. JOHNSON.

IN THE KING'S BENCH, FEBRUARY 4, 1772.

[Reported in 5 *Burrow*, 2825.]

IN an action of trover before Lord Mansfield the plaintiff was nonsuited, subject to the opinion of the court on the following case:—

The goods in question, being the property of the plaintiff, were delivered by the captain of the vessel to the defendants as wharfingers, for the use and upon the account of the plaintiff, to whom they were directed, but were stolen or lost out of their possession; and afterwards, before the commencement of this action, were demanded by the plaintiff of the defendants, to whom he tendered the wharfage for the same; but the goods were not delivered to him.²

LORD MANSFIELD declared his disapprobation of nonsuits founded upon objections which had no relation to the merits of a cause. But

¹ *Isaac v. Clark*, 2 Bulst. 306, 312; *Bromley v. Coxwell*, 2 B. & P. 438; *Conner v. Allen*, 33 Ala. 515; *Savage v. Smythe*, 48 Ga. 562; *Sturges v. Keith*, 57 Ill. 451; *Railroad Co. v. Kidd*, 7 Dana, 252; *Ragsdale v. Williams*, 8 Ired. 498; *Emory v. Jenkinson*, Tapp. 219; *Ankim v. Woodward*, 6 Whart. 577; *Jones v. Allen*, 1 Head, 626; *Abbott v. Kimball*, 19 Vt. 558; *Nutt v. Wheeler*, 30 Vt. 436; *Tinker v. Morrill*, 39 Vt. 477; *Bailey v. Mouthrop*, 55 Vt. 13 *Accord.* — Ed.

² The statement is abridged, and the arguments are omitted. — Ed.

he looked upon it as established upon principles and authorities, that trover would not lie in the present case; but that it must be an action upon the case.

It is impossible, he said, to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger; but in order to maintain trover there must be an injurious conversion. This is not to be esteemed a refusal to deliver the goods. They cannot deliver them; it is not in their power to do it. It is a bare omission.

Mr. Justice ASTON agreed, that this being a bare omission, and no evidence of a conversion, trover would not lie; but the clear remedy was by action upon the case; and he cited *Owen v. Lewyn*,¹ where Hale said, "that if a carrier loseth goods committed to him, a general action of trover doth not lie against him."

Mr. Justice WILLES and Mr. Justice ASHHURST concurring in opinion with his Lordship and Mr. Justice ASTON,

*The court ordered that the nonsuit should stand.*²

FARRAR v. ROLLINS.

SUPREME COURT, VERMONT, AUGUST TERM, 1864.

[Reported in 37 Vermont Reports, 295.]

TROVER for a sled. Plea: Not guilty. *Verdict for plaintiff.*

POLAND, C. J.³ It is fairly to be inferred from the exceptions that the plaintiff's sled was in the defendant's possession at the time the plaintiff requested the defendant to return it.

The plaintiff did not claim that the defendant obtained possession of it wrongfully, but that he loaned it to him, or to his servant, Cole, so that there was no conversion by a wrongful taking. But the plaintiff claims that it was unlawfully detained and withheld from him by the defendant when he called for or demanded it.

The plaintiff requested the defendant to return the sled to his (the

¹ 1 Ventris, 223.

² *George v. Wiburn*, 1 Roll. Abr. 6 pl. 4; *Lownsdell's Case*, Clayt. 104; *Owen v. Lewyn*, 1 Vent. 223; *Anon.*, 2 Salk. 655; *Attersol v. Bryant*, 1 Camp. 409; *Severin v. Keppel*, 4 Esp. 156; *Williams v. Gesse*, 3 Bing. N. C. 452; *Heald v. Carey*, 21 L. J. C. P. 97; *Davis v. Hunt*, 114 Ala. 147; *Dearbourn v. Un. Nat. Bank*, 58 Me. 273; *Dwight v. Brewster*, 1 Pick. 50; *Bowlin v. Nye*, 10 Cush. 416; *Robinson v. Austin*, 2 Gray, 564; *Dorman v. Kane*, 5 All. 38; *Smith v. Nat. Bank*, 99 Mass. 606; *Way v. Dennie*, 174 Mass. 43; *Johnson v. Strader*, 3 Mo. 359; *Packard v. Getman*, 4 Wend. 613; *Lockwood v. Bull*, 1 Cow. 322; *Hawkins v. Hoffman*, 6 Hill, 586; *Scovill v. Griffith*, 12 N. Y. 509; *Nat. Bank v. Wheeler*, 48 N. Y. 492; *Walmesley v. Atlas Co.*, 168 N. Y. 533; *Briggs v. N. Y. Co.*, 28 Barb. 515; *Louisville Co. v. Campbell*, 7 Heisk. 253 *Accord*.

Compare *Gr. W. Co. v. Crouch*, 3 H. & N. 183; *La Place v. Aupoix*, 1 Johns. Ca. 406; *Holbrook v. Wright*, 24 Wend. 177; *Decker v. Shelton*, 1 Th. & C. 224. — Ed.

³ Only the opinion of the court is given. — Ed.

plaintiff's) house, where he got it. This the defendant refused to do, on the ground that when Cole borrowed the sled he borrowed it for himself, and not for the defendant. The defendant made no claim to the sled, and no objection to the plaintiff's taking it; he only refused to carry it to the plaintiff's house, claiming he was under no obligation to do so. If the borrowing was really on behalf of the defendant, so that it was his duty to have returned it to the plaintiff, his refusal to do so was no conversion; it was a mere breach of contract, for which he might be liable in a proper action.

The principle is undoubted that where one has the property of another in his possession, with no right to retain it, and being called on to surrender it to the owner, refuses, he is guilty of conversion, and trover will lie. But here was no refusal to surrender the sled to the plaintiff, and no withholding it from him; indeed, the plaintiff did not ask to have it delivered to him. He claimed that the defendant should carry the sled to his house, which the defendant refused. If this refusal was wrongful, it was no conversion. There was no repudiation of the plaintiff's right to the sled, and no assertion or exercise of any dominion over it by the defendant inconsistent with the plaintiff's right. The plaintiff could have his sled when he called for it, but insisted the defendant should fulfil his duty, or perform his contract by carrying it home.

*Judgment reversed and case remanded.*¹

¹ Moore v. Monroe Co., 138 Ala. 621; Fifield v. Maine Co., 62 Me. 77; Bassett v. Bassett, 119 Mass. 99; O'Connell v. Jacobs, 115 Mass. 21; Ware v. First Society, 125 Mass. 584; Dame v. Dame, 38 N. H. 429; Gillet v. Roberts, 57 N. Y. 28; Munger v. Hess, 28 Barb. 75 Accord.

Compare Bank of America v. McNeil, 10 Bush, 54; Powell v. Powell, 3 Hun, 413; Richards v. Pitts Works, 37 Hun, 1.

In Industrial Trust v. Kennedy, 170 N. Y. 233; 171 N. Y. 641, the facts were regarded by the majority of the court as constituting a breach of contract rather than a conversion. But two judges dissented vigorously. — ED.

SECTION II. (*continued*).

(b) DESTRUCTION, OR CHANGE IN NATURE OR QUALITY OF A CHATTEL.

RICHARDSON v. ATKINSON.

AT NISI PRIUS, CORAM EYRE ET FORTESCUE, 1723.

[*Reported in 1 Strange, 576.*]

THEY held that the drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole.¹

SIMMONS v. LILLYSTONE.

IN THE EXCHEQUER, FEBRUARY 12, 1853.

[*Reported in 8 Exchequer Reports, 431.*]

THE second count was in trover for the conversion of goods and chattels, to wit, five hundred pieces of timber.

Pleas (*inter alia*) to the whole declaration, not guilty.

The plaintiff joined issue on the first plea.

At the trial, before Pollock, C. B., at the London sittings after last Michaelmas term, it appeared that the plaintiff carried on the business of a mast, oar, and block maker at Milton next Gravesend. The evidence in support of the second count was, that certain pieces of timber or spars used for making bowsprits, and belonging to the plaintiff, being on the defendant's land, he caused them to be removed; and upon the timber being again placed there, and having become imbedded in the soil, the defendant directed his workmen to dig a saw-pit in his land, and in so doing they cut through the timber, leaving the pieces there, and part of them was afterwards carried away by the tide of the river, which at high water flowed over the land, the other part remaining imbedded in the soil.

¹ Dench v. Walker, 14 Mass. 500 [August, 1780. Trover for four hogsheads of rum. On the trial, the evidence appeared thus:—

Walker undertook to transport from Boston to Springfield the four hogsheads of rum for the plaintiff. At the time of the delivery to Walker, the rum was good; but on its arrival at Springfield, it was much adulterated and greatly lessened in value; and whether it was thus adulterated by the defendant himself, or by his servant the teamster, did not appear. It was objected that trover did not lie in this case.

But CUSHING, C. J., with the rest of the court, held that it will lie. For the alteration of the quality of the liquor undertaken to be transported, whether it was done by the defendant or his servant, was an unlawful conversion. — *Vide Holt, 528.* See also *Holsworth's Case*, Clayt. 57; *Burnham v. Marshall*, 56 Vt. 365. — ED.

It was objected, on the part of the defendant, that there was no evidence of a conversion. His lordship was of opinion that there was *prima facie* evidence of a conversion. The jury found a verdict for the plaintiff; damages £60.

Bramwell, in last Michaelmas term, having obtained a rule *nisi*, *Shee*, Serjt., and *Rose* showed cause in Hilary term (January 27).

There was evidence of a conversion. In order to constitute a conversion, it is not necessary that there should be an acquisition of property by the defendant: it is sufficient if there be a deprivation of property to the plaintiff. *Keyworth v. Hill*. [PARKE, B. Here the defendant never intended to take to himself any property in the timber.] If a person purposely left the gate of a field open, so that a horse escaped, that would amount to a conversion. [PARKE, B. The form of a count in trover, prescribed by the Common-law Procedure Act, 15 & 16 Vict. c. 76, Sched. (B.), is, "that the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of, the plaintiff's goods." Suppose a person threw a stone into a room through an open window, and broke a looking-glass, would that be a conversion of it?] It is submitted that any wilful damage to a chattel, whereby the owner is deprived of the use of it in its original state, is a conversion. [PLATT, B. Taking wine from a cask and filling it up with water is a conversion of the whole liquor. *Richardson v. Atkinson*.] The principle laid down in *Fouldes v. Willoughby* is, that a mere wrongful asportation does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use or that of some third person, or unless the act done has the effect either of destroying or changing the quality of the chattel. Here the cutting of the timber destroyed it as timber. In the case of two tenants in common, each has an interest in the chattel, so that nothing short of an absolute destruction of it will amount to a conversion; but, in ordinary cases, any injury which alters the nature or quality of the chattel is a conversion of it.

Willes, in support of the rule.¹

PARKE, B. The question which relates to the count in trover is, whether there was any evidence of a conversion. Now the evidence was that the pieces of timber were cut in two by the defendant; that they were left imbedded in the soil, — not applied to the defendant's own use, — and that part of them was carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there was no sufficient evidence of a conversion to entitle the plaintiff to a verdict on the plea of not guilty. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as, for instance, by burning it, that would be a taking of the property from the plaintiff and depriving him of it,

¹ The argument of the defendant is omitted. — Ed.

although the defendant might not be considered as appropriating it to his own use. In this case nothing is done but cutting the timber, and, by accident, it is washed away by the river, — not purposely thrown by the defendant to be washed away; consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise whether that conversion was not excused by the right which the defendant had to make the saw-pit, and to cut the timber in making it, if he was not able to do it in any other way.¹ But, without deciding that, we think that there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use; that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property. None of those alternatives are made out by the evidence, and consequently there ought to be a verdict for the defendant on the plea of not guilty to the count in trover.

*Rule accordingly.*²

¹ To destroy property of the plaintiff which is interfering with the safety or use of the defendant's property is not a wrongful conversion, so long as the defendant's conduct is not wanton or reckless. *McKeesport Co. v. Pa. Co.*, 123 Fed. 184; *Mark v. Hudson Co.*, 103 N. Y. 23; *Philiber v. Matsor*, 14 Pa. 306; *Forster v. Juniata Co.*, 16 Pa. 393; *Beach v. Schoff*, 23 Pa. 195; *Gumbert v. Wood*, 146 Pa. 376.

² See *Philpott v. Kelley*, 3 A. & E. 106; *Byrne v. Stout*, 15 Ill. 180; *Sanderson v. Havestick*, 3 Pa. 294. — ED.

SECTION II. (*continued.*)

(c) ASPORTATION.

BASSET v. MAYNARD.

IN THE QUEEN'S BENCH, EASTER TERM, 1601.

[*Reported in 1 Rolle, Abridgment, 105 (M) placitum 5.*]

IF I cut certain wood, and a stranger takes it out of my possession, although I may have an action of trespass, still I may also have an action on the case [*i. e.* trover] at my election.¹

TINKLER v. POOLE.

IN THE KING'S BENCH, NOVEMBER 11, 1770.

[*Reported in 5 Burrow, 2657.*]

THIS was an action of trover for goods seized by a custom-house officer. It was a parcel of herrings seized by him for not having satisfied the salt duty, and carried by him to the king's warehouse. It was agreed that they were not seizable; and the only question was, "whether this species of action lay against the officer for seizing them and carrying them away."

Glynn, Serjt., for the plaintiff, argued that it did.²

There is indeed a single *nisi prius* case reported in Bunbury, 67, Mich. 1720, at Guildhall sittings after that term, before Ld. Ch. Baron Bury: *Etrick v. An Officer of the Revenue*. Upon an information of seizure of goods, there had been a verdict for the defendant, who afterwards brought trover against the officer for the goods. The Attorney-

¹ Trover was not originally concurrent with trespass for a taking. Indeed, the year before the principal case the Court of Common Pleas, in *Bishop v. Montague*, Cro. El. 824, were equally divided upon the question; but on a re-argument, in 1604, it was decided by three judges against two in favor of the plaintiff's election, as in the principal case. The Exchequer gave a similar decision in 1610, *Leverson v. Kirk*, 1 Roll. Ab. 105 [M] pl. 10. In *Kinaston v. Moore*, Cro. Car. 89, we read, "*Semble per all the justices and barons, although he take it as a trespass, yet the other may charge him in an action on the case in a trover if he will.*" It has been uniformly held ever since that a wrongful taking under a claim of right is a conversion. *Beckwith v. Elsey*, Clayt. 112; *Metcalf's Case*, Clayt. 113; *Bruen v. Roe*, 1 Sid. 264; *Crossier v. Ogleby*, 1 Stra. 60; *Norman v. Bell*, 2 B. & Ad. 190; *Tear v. Freebody*, 4 C. B. N. S. 228; *Moody v. Whitney*, 34 Me. 563; *Nelson v. Burt*, 15 Mass. 204; *Cummings v. Perham*, 1 Metc. 555; *Phillips v. Bowers*, 7 Gray, 21; *Coughlin v. Ball*, 4 All. 334; *Johnson v. G. T. R. R. Co.*, 44 N. H. 626; *Davis v. Flemming*, 1 McCord, 213; *Childress v. Ford*, 1 Heisk. 463; *Weymouth v. R. R. Co.*, 17 Wis. 550. — ED.

² The argument for the plaintiff is slightly abridged. — ED.

General objected that trover did not lie for these goods (for that the seizure of them, and putting them into the custom-house warehouse, could not be said to be any conversion to his own use), but trespass, or trespass upon the case; and Mr. Attorney insisting upon a special verdict, and the Chief Baron inclining to be of that opinion, "that trover would not lie," the plaintiff chose to be nonsuited. But this is no solemn determination.

LORD MANSFIELD said, Mr. Bunbury never meant that those cases should have been published; they are very loose notes.

Mr. Justice WILLES mentioned another case in Bunbury, p. 80, Trin. 1721 (*Israel v. Etheridge et al.*), where Baron Price said that it was now allowed and taken for law "that trover did not lie against an officer for seizing *absque probabili causa*, but trespass would." Baron Montague was of opinion "that neither trover nor trespass would lie, because the seizure is not *contra pacem*; but that trespass upon the case, setting forth that the seizure was *absque probabili causa*, would lie." Baron Page was of opinion "that trespass, or case for the consequential damages, will lie."

Mr. Dunning, for the defendants, remarked upon the case last cited, that it appeared by it that the three barons, Price, Montague, and Page, all concurred in the opinion "that trover would not lie."

LORD MANSFIELD. It is a very loose note. It makes Baron Montague say "that trespass would not lie."

Mr. Justice WILLES mentioned the case of *Kenicot v. Bogan*,¹ which was trover and conversion of two tuns of wine, taken for prisage.

LORD MANSFIELD, who tried the present cause, said he saved this point upon the cases cited out of Bunbury by the counsel for the defendants; but nothing is clearer than "that trover lies." It is a wrongful conversion, let the property be in whom it will.

The case of *Chapman v. Lamb*² was mentioned by Mr. Wallace; which was subsequent to the others, being in Michaelmas term, 6 Geo. II. It was trover against a custom-house officer for fourteen shirts, a night gown and cap, seized for non-payment of duty, which were stated negatively "not to be imported as merchandise." The plaintiff had judgment, without any objection to its being an action of trover.

The court ordered the *postea* be delivered to the plaintiff.³

¹ Yelv. 198.

² 2 Stra. 943.

³ By reference to *Basset v. Maynard*, *supra*, p. 273 n., it appears that about the beginning of the seventeenth century trover became concurrent with trespass for a taking analogous to a disseisin of land. Originally even trespass could not be maintained except for such a taking. 3 Harv. L. Rev. 31. Replevin was anciently the exclusive remedy for a wrongful distress. But for a long time before the principal case it had been conceded that trespass would lie against a wrongful distrainer. A distress, however, even after trespass became concurrent with replevin, was not regarded as a conversion. *Dee v. Bacon*, Cro. El. 435; *Salter v. Butler*, Noy, 46; *Agard v. Lisle*, Hutt. 10. The cases in Bunbury, cited in *Tinkler v. Poole*, simply followed the precedents; and the significance of the principal case lies in this, that it was an uncon-

JOHNSON AND ANOTHER v. FARR.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1880.

[Reported in 60 New Hampshire Reports, 426.]

TROVER, for a lot of last-blocks. Facts found by a referee. The defendant attached the blocks as the property of one Howe, August 21, 1878, on a writ in favor of A. T. & O. F. Barron against said Howe, which is made a part of the case. Judgment was rendered in that action November 14, 1879, and execution issued thereon, but was never put into the hands of the defendant, or any other sheriff, for levy.¹

W. & H. Heywood and Ladd & Fletcher, for the plaintiffs.

Ray, Drew & Jordan, for the defendant.

BLODGETT, J. It is stated in his return on the writ, and it is also found as a fact by the referee, that the defendant attached the blocks in question; and as against him, at least, it is to be presumed that the attachment was valid.

To constitute a valid attachment of personal property, it must be taken into the possession or be placed under the control of the officer. Odiorne v. Colley,² Huntington v. Blaisdell,³ Dunklee v. Fales,⁴ Scott v. Print Works.⁵ Hence, it is to be assumed that the defendant took possession of these blocks, or placed them under his control; and if he did, it follows that to the extent of his possession and dominion the plaintiffs were necessarily excluded and divested. And we see no reason why such exclusion was not total; for the only object of an attachment of movable property being to take the property attached out of the possession and custody of the alleged debtor and transfer it to the possession and custody of the law, acting through its officer, he must, as against the debtor, be vested with the exclusive possession or custody of such property by the attachment, or its sole object would be defeated; and, moreover, it is a self-evident proposition, that neither the actual custody nor exclusive control in the same thing can at the same time be vested in two distinct persons.

But upon the question of the maintenance of the action, the extent of the plaintiffs' exclusion is quite immaterial, and so, also, is the fact that the blocks were not removed; for it was enough to constitute a wrongful conversion, if the defendant assumed such control over the blocks, by a possession actual or constructive, as deprived the plaintiffs

scious repetition for the action of trover of the process of development which had already taken place in the action of trespass. Ever since *Tinkler v. Poole* it has been agreed that trover would lie for a wrongful distress. *Shipwick v. Blanchard*, 6 T. R. 298; *Hardy v. Keeler*, 56 Ill. 152; *Hall v. Amos*, 5 Monr. 89; *Connah v. Hale*, 23 Wend. 462; *Reynolds v. Shuler*, 5 Cow. 323. — Ed.

¹ The statement of facts and the opinion are slightly abridged. — Ed.

² 2 N. H. 66.

³ 2 N. H. 317.

⁴ 5 N. H. 527, 528.

⁵ 44 N. H. 508, per Bartlett, J.

of their dominion over them for any purpose. *Morse v. Hurd*,¹ *Bristol v. Burt*, *Reynolds v. Shuler*,² *Wintringham v. Lafoy*,³ *Woodbury v. Long*,⁴ *Miller v. Baker*, *St. George v. O'Connell*,⁵ *Tinker v. Morrill*,⁶ *M'Combie v. Davies*; *Cool. Torts*, 448; 2 *Greenl. Evid.* 642; 6 *Wait Act. & Def.* 167. And that this was the necessary effect of the attachment is, we think, quite too plain for discussion.

*Exceptions overruled.*⁷

BUSHEL v. MILLER.

AT NISI PRIUS, CORAM PRATT, C. J., NOVEMBER 21, 1718.

[Reported in 1 *Strange*, 128.]

UPON the Custom-house Quay there is a hut where particular porters put in small parcels of goods if the ship is not ready to receive them when they are brought upon the quay. The porters, who have a right in this hut, have each particular boxes or cupboards, and, as such, the defendant had one. The plaintiff, being one of the porters, put in goods belonging to A., and lays them so that the defendant could not get to his chest without removing them. He accordingly does remove them about a yard from the place where they lay, towards the door, and without returning them into their place goes away, and the goods are lost. The plaintiff satisfies A. of the value of the goods, and brings trover against the defendant. And upon the trial two points were ruled by the Chief Justice:—

1. That the plaintiff, having made satisfaction to A. for the goods, had thereby acquired a sufficient property in them to maintain trover.
2. That there was no conversion in the defendant. The plaintiff by laying his goods where they obstructed the defendant from going to his chest was, in that respect, a wrong-doer. The defendant had a right

¹ 17 N. H. 246, 249.

² 5 Cow. 323, 325.

³ 7 Cow. 735, 738.

⁴ 8 Pick. 543, 545.

⁵ 110 Mass. 475.

⁶ 39 Vt. 480.

⁷ *Abercrombie v. Bradford*, 16 Ala. 560; *Meade v. Smith*, 16 Conn. 346; *Woodbury v. Long*, 8 Pick. 543; *Blanchard v. Coolidge*, 22 Pick. 151; *Bowen v. Sanborn*, 1 All. 389; *McPartland v. Read*, 11 All. 231; *Woods v. Keyes*, 14 All. 236; *Dow v. Cheney*, 103 Mass. 181; *Howard v. Cooper*, 45 N. H. 339; *Farrington v. Payne*, 15 Johns. 431 *Accord*.

Similarly, a wrongful levy on final process is a conversion. *Smith v. Plomer*, 15 East, 607; *Goode v. Langley*, 7 B. & C. 26; *Glasspoole v. Young*, 9 B. & C. 696; *Stuart v. Phelps*, 39 Iowa, 14; *Prescott v. Wright*, 6 Mass. 20; *Matheny v. Johnson*, 9 Mo. 230; *Woodward v. Murray*, 18 Johns. 400; *Case v. Hart*, 11 Oh. 364; *Dargan v. Richardson*, *Dudley* (S. Ca.), 62; *Crawford v. Thomason* (Tex. Civ. Ap. 1909), 117 S. W. R. 181.

But in no case will there be a conversion unless the officer takes the goods into his custody or control. For want of a change of possession, there was no conversion in *Mallalien v. Laughner*, 3 C. & P. 551; *Herron v. Hughes*, 25 Cal. 555; *Rand v. Sargent*, 23 Me. 326; *Fernald v. Chase*, 37 Me. 239; *Bailey v. Adams*, 14 Wend. 301.—Ed.

to remove the goods, so that thus far he was in no fault. Then, as to the not returning the goods to the place where he found them; if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.

FORSDICK v. COLLINS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., FEBRUARY 18, 1816.

[*Reported in 1 Starkie, 173.*]

TROVER for the value of a block of Portland stone.

The stone had been placed by the plaintiff on the land adjoining some shells of houses, which he had purchased in Hunter Street. The defendant, afterwards coming into possession of the land, refused to permit the plaintiff to carry the stone away, and afterwards removed it himself to Burton Crescent Mews.

Puller, for the defendant, contended that he had a right to remove it from his own premises.

LORD ELLENBOROUGH. But he is not justified in removing it to a distance. In an action of trespass at the suit of the owner, he must in his justification have alleged that he removed it to some adjacent place for the use of the owner; he could not have justified this removal.

Puller insisted that no sufficient demand had been proved.

LORD ELLENBOROUGH. A demand is unnecessary where the party has been guilty of a conversion, and he is guilty of a conversion where he oversteps the authority of law; here the defendant overstepped that authority by removing the property to a distance.

Verdict for the plaintiff.

FOULDES v. WILLOUGHBY.

IN THE EXCHEQUER, JUNE 1, 1841.

[*Reported in 8 Meeson & Welsby, 540.*]

TROVER for divers, to wit, two horses. Plea: Not guilty. The cause was tried before Maule, J., at the last spring assizes for Liverpool, when it appeared that the defendant was the occupier or manager of a ferry by means of steamboats over the river Mersey, from Birkenhead to Liverpool, and that on the 15th of October, 1840, the plaintiff had embarked on board the defendant's ferry-boat at Birkenhead, having with him two horses, for the carriage of which he had

paid the usual fare. It was alleged that the plaintiff misconducted himself and behaved improperly after he came on board the steamboat, and when the defendant came on board he told the plaintiff that he would not carry the horses over, and that he must take them on shore. The plaintiff refused to do so, and the defendant took the horses from the plaintiff, who was holding one of them by the bridle, and put them on shore on the landing-slip. They were driven to the top of the slip, which was separated by gates from the high road, and turned loose on the road. They were shortly afterwards seen in the stables of a hotel at Birkenhead, kept by the defendant's brother. The plaintiff remained on board the steamboat, and was conveyed over the river to Liverpool. On the following day the plaintiff sent to the hotel for the horses, but the parties in whose possession they were refused to deliver them up. A message, however, was afterwards sent to him by the hotel-keeper, to the effect that he might have the horses on sending for them and paying for their keep; and that if he did not send for them and pay for their keep, they would be sold to pay the expense of it. The plaintiff then brought the present action. The horses were subsequently sold by auction. The defence set up at the trial was, that the plaintiff had misconducted himself and behaved improperly on board, and that the horses were sent on shore in order to get rid of the plaintiff, by inducing him to follow them. The learned judge told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion, unless they thought the plaintiff's conduct had justified his removal from the steamboat, and he had refused to go without his horses; and that if they thought the conversion was proved, they might give the plaintiff damages for the full value of the horses. The jury found a verdict for the plaintiff with £40 damages, the value of the horses.

In Easter term last, a rule was obtained calling upon the plaintiff to show cause why the verdict should not be set aside on the ground of misdirection, both as to the proof of a conversion, and also as to the amount of the damages; against which rule

W. H. Watson and *Atherton* now showed cause. The evidence showed that which clearly amounted to a conversion, and it was not affected by the circumstance that the plaintiff had the means afterwards, if he had chosen, of obtaining the horses again. A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion. [LORD ABINGER, C. B. According to that argument, every trespass is a conversion.] If a man takes and rides another person's horse without his consent, however short a distance, it is in law a conversion. [ALDERSON, B. In that case there is a user of the horse. LORD ABINGER, C. B. In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of their owner. ALDERSON, B. If a man were to remove my carriage a

few yards, and then leave it, would he be guilty of a conversion?] In the notes to *Wilbraham v. Snow*,¹ it is said, "Whenever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie, for one may qualify but not increase a tort;" citing *Bishop v. Montague*.² [LORD ABINGER, C. B. I cannot agree to that position, at least to the extent for which it is now used.³]

Crompton, in support of the rule.⁴

LORD ABINGER, C. B. This is a motion to set aside the verdict on the ground of an alleged misdirection; and I cannot help thinking that if the learned judge who tried the cause had referred to the long and frequent distinctions which have been taken between such a simple asportation as will support an action of trespass, and those circumstances which are requisite to establish a conversion, he would not have so directed the jury. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established, by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel to-day, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think that the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightly or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the rights which the plaintiff had in them. Suppose, instead of the horses, the defendant had put the plaintiff himself on shore, and on being put on shore the plaintiff had refused to take his horses with him, and the defendant had said he would take them to the other side of the water, and had done so, would that be a conversion? That would be a much more colorable case of a conversion than the present, because, by separating the man from his property, it might, with some appearance of fairness, be said the party was carrying away the horses without any justifiable reason for so doing. Then, having conveyed them across the water,

¹ 2 Saund. 470.

² Cro. Eliz. 824.

³ In the case cited, the beasts were taken absolutely by the defendant's bailiff as for a heriot due, the defendant afterwards agreeing to the taking and converting them. The court differed in opinion whether trover was maintainable, or whether the action should not have been trespass.

⁴ The argument for the plaintiff is abridged, and that for the defendant omitted, as well as the concurring opinion of GURNEY, B., and a part of that of BOLFE, B. — Ed.

and finding neither the owner or any one else to receive them, what is he to do with them? Suppose, under those circumstances, the defendant lands them, and leaves them on shore, would that amount to a conversion? The argument of the plaintiff's counsel in this case must go the length of saying that it would. Then, suppose the reply to be that those circumstances would amount to a conversion, I ask, at what period of time did the conversion take place? Suppose the plaintiff had immediately followed his horses when they were put on shore, and resumed possession of them, would there be a conversion of them in that case? I apprehend, clearly not. It has been argued that the mere touching and taking them by the bridle would constitute a conversion, but surely that cannot be: if the plaintiff had immediately gone on shore and taken possession of them, there could be no conversion. Then the question, whether this were a conversion or not, cannot depend on the subsequent conduct of the plaintiff in following the horses on shore. Would any man say, that if the facts of this case were, that the plaintiff and defendant had had a controversy as to whether the horses should remain in the boat, and the defendant had said, "If you will not put them on shore, I will do it for you," and, in pursuance of that threat, he had taken hold of one of the horses to go ashore with it, an action of trover could be sustained against him? There might, perhaps, in such a case, be ground for maintaining an action of trespass, because the defendant may have had no right to meddle with the horses at all; but it is clear that he did not do so for the purpose of taking them away from the plaintiff, or of exercising any right over them, either for himself or for any other person. The case which has been cited from *Strange's Reports*, of *Bushel v. Miller*, seems fully in point. There the plaintiff and defendant, who were porters, had each a stand on the Custom-house Quay. The plaintiff placed goods belonging to a third party in such a manner that the defendant could not get to his chest without removing them, which he accordingly did, and forgot to replace them, and the goods were subsequently lost. Now suppose trespass to have been brought for that asportation, the defendant, in order to justify the trespass, would plead that he removed the parcels, as he lawfully might, for the purpose of coming at his own goods; and the court there said that whatever ground there might be for an action of trespass in not putting the package back in its original place, there was none for trover, inasmuch as the object of the party in removing it was one wholly collateral to any use of the property, and not at all to disturb the plaintiff's rights in or dominion over it. Again, suppose a man puts goods on board of a boat, which the master thinks are too heavy for it, and refuses to carry them, on the ground that it might be dangerous to his vessel to do so, and the owner of the goods says, "If you put my goods on shore, I will go with them," and he does so; would that amount to a conversion in the master of the vessel, even assuming his judgment as to the weight of the goods to be quite erroneous, and that there really

would be no danger whatever in taking them? In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them; by himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed, to the prejudice of the lawful owner. As an instance of the latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or as in the case cited in the course of the argument, of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses, and consequently the rule for a new trial ought to be made absolute.

With respect to the amount of damages, it was altogether a question for the jury. I am not at all prepared to say, that if the jury were satisfied that there had been a conversion in this case, they would be doing wrong in giving damages to the full value of the horses. I do not at all rest my judgment on that point, but put it aside entirely. If the judge had told the jury that there was evidence in the case from whence they might infer that a conversion of these horses had taken place at some time, it would have been different; but his telling them that the simple act of putting them on shore amounted to a conversion, I think was a misdirection, on which the defendant is entitled to a new trial.

ALDERSON, B. I am of the same opinion. As to the last point, it would be a strange thing to disturb the verdict on the ground that the jury had given as damages the full value of these horses; for it appears that they were ultimately sold, and the plaintiff never regained possession of them. If, therefore, the original act of taking the horses really amounted to a conversion of them, it would be a strong proposition for us to say that the plaintiff was not entitled to recover their full value, as damages for the wrongful act done. But the mere circumstance which the learned judge in this case put to the jury, as constituting the conversion, does not necessarily amount to one. Any asportation of a chattel for the use of the defendant, or a third person, amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which at all

times, and in all places, I am entitled to make of it, and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is where a man does an act the effect of which is not for a moment to interfere with my dominion over the chattel, but, on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did this defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrong-doer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound. But such is not the law; and the true principle is that stated by Chambre and Holroyd, JJ., when at the bar, in their argument in the case of *Shipwick v. Blanchard*,¹ that "in order to maintain trover the goods must be taken or detained with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it; namely, that the destruction of the goods will also amount to a conversion. For these reasons I think, in the case before us, the question ought to have been left to the jury to say whether the act done by the defendant of seizing these horses and putting them on shore, was done with the intention of converting them to his own use, *i. e.*, with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

ROLFE, B. In every case of trover there must be a taking with the intent of exercising over the chattel an ownership inconsistent with the real owner's right of possession. Now suppose, instead of actually removing the horses from the boat, the defendant had waved his hand, or cracked a whip, and so made the animals jump out of the boat, would that amount to a conversion? I do not see how, on the hypothesis of Mr. Watson, any other answer could be given than in the affirmative; for if the principle be that anything which controls the position of the chattel while in my possession, will amount to a change of ownership, I do not see how the effecting of that change by frightening the animal which constitutes my property, is distinguishable from any other means adopted for the same purpose. Again, suppose I, seeing a horse in a ploughed field, thought it had strayed, and under that impression led it back to pasture, it is clear that an action of trespass would lie against me; but would any man say that this amounted to a conversion of the horse to my own use? Or suppose a man drives his carriage up into

¹ 6 T. R. 298.

an inn yard, and the innkeeper refuses to take it and his horses in, but turns them out into the road, could it be said that he thereby converted them to his own use? Surely not. The same principle applies to the case which has been cited, of *Bushel v. Miller*, where a party was held to have a right to move certain goods of another person, provided he put them back again; his not putting them back may give the other a right to bring trespass against him, on the ground that his subsequent neglect made him a trespasser *ab initio*; but it is clear that there was no conversion of the chattel. So that we find the distinction to which I have alluded, between trespass and trover, continually recognized in law. I quite agree with my Brother Gurney, that if the learned judge in the present case had not put the conversion to the jury as founded on the single fact of taking the horses on shore, but had left it for their consideration on the whole case as it stood, not only was there evidence of a conversion, but there was such as would have fully warranted the jury in coming to the conclusion at which they arrived. The question, however, was not so left to the jury, and this rule to set aside the verdict for misdirection must therefore be made absolute.

*Rule absolute.*¹

TIMOTHY SHEA v. INHABITANTS OF MILFORD AND
ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 6, 1888.

[Reported in 145 Massachusetts Reports, 525.]

W. ALLEN, J.² The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction, that, if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of

¹ *Triscone v. Orr*, 49 Cal. 612; *Eldridge v. Adams*, 54 Barb. 417; *Jordan v. Greer*, 5 Sneed, 165 *Accord.* — Ed.

² Only the opinion of the court is given. — Ed.

property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth v. Lowery*; ¹ *Fouldes v. Willoughby*; ² *Heald v. Carey*.³

It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question.

*Exceptions overruled.*⁴

¹ 184 Mass. 512.

² 8 M. & W. 540.

³ 11 C. B. 977.

⁴ *Burgess v. Graffam*, *supra*, p. 125; *Farnsworth v. Lowery*, 184 Mass. 512; *Mattice v. Brinkman*, 74 Mich. 705; *Sparks v. Purdy*, 11 Mo. 219; *Roe v. Campbell*, 40 Hun, 49, 52 (*semble*) *Accord*. — Ed.

SECTION II. (*continued*).

(d) DEFENDANT A PURCHASER, PLEDGEE, OR BAILEY OF A WRONGFUL TRANSFEROR.

GALVIN v. BACON.

IN THE SUPREME JUDICIAL COURT, MAINE, JUNE TERM, 1833.

[Reported in 11 Maine Reports, 28.]

THIS was an action of replevin for a horse. On trial before Weston, Justice, it appeared that the horse was originally the property of the plaintiff. That the defendant bought him of one McAllister, he of one Scott, and Scott of one Staples, to whom the horse had been delivered by the plaintiff for use for a limited period and under the expectation of a purchase by Staples. The horse in question was delivered at each of these sales, and it was agreed that Scott, McAllister, and the defendant respectively, purchased *bona fide* for a valuable consideration, and without notice of any claim or interest in the plaintiff. There was no evidence that the plaintiff had made any demand on the defendant for the horse prior to the bringing of this action. Whereupon it was insisted that the plaintiff had failed to support the action. But with a view to have the jury pass upon the question of general property which was in controversy, the presiding judge ruled otherwise. The jury returned their verdict for the plaintiff. If, upon the foregoing ground, he had failed to make out a case, entitling him in the opinion of the court to retain it, the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

A. G. Chandler, for the defendant.

Downes, for the plaintiff.¹

The opinion of the court was delivered by

WESTON, J. Where a party is rightfully in possession of property belonging to another, he does not unlawfully detain it, until after a demand by the true owner and a refusal. But if the taking is tortious, no such demand is necessary. This is a principle uniformly applied in actions of trover. In *Gates v. Gates*,² and in *Seaver v. Dingley*,³ the same rule is understood to apply in cases of replevin. In some other cases cited, as in *Hussey et al. v. Thornton et al.*,⁴ and in *Marston v. Baldwin*,⁵ this point does not appear to have been taken.

It is assumed in argument, on the part of the counsel for the defendant, that his possession was lawful, and that a demand was necessary by the plaintiff, to enable him to maintain replevin. And if his premises are correct, he is sustained in his position, by some of the

¹ The arguments of counsel are omitted. — Ed.

² 15 Mass. 311.

⁴ 4 Mass. 405.

³ 4 Greenl. 306.

⁵ 17 Mass. 606.

cases cited. The possession of the defendant did not subject him to the imputation of anything morally wrong. He acted in good faith, having purchased of one whom he supposed to have been the rightful owner; as did two others, who successively purchased and sold the horse in question. But their supposition did not accord with the fact. The horse was from the beginning the property of the plaintiff; and he had never authorized either of these sales.

Whoever takes the property of another, without his assent express or implied, or without the assent of some one authorized to act in his behalf, takes it, in the eye of the law, tortiously. His possession is not lawful against the true owner. That is unlawful, which is not justified or warranted by law; and of this character may be some acts, which are not attended with any moral turpitude. A party honestly and fairly, and for a valuable consideration, buys goods of one who had stolen them. He acquires no rights under his purchase. The guilty party had no rightful possession against the true owner; and he could convey none to another. The purchaser is not liable to be charged criminally; because innocent of any intentional wrong; but the owner may avail himself against him of all civil remedies, provided by law for the protection of property. If the bailee of property for a special purpose, sells it without right, the purchaser does not thereby acquire a lawful title or possession.

In the case before us, Staples was rightfully in possession of the horse, but he had no right to sell him; if he had, the plaintiff would, upon the sale, have ceased to be the owner, which has been negatived by the verdict. It does not follow, because his possession was rightful, that those who hold under him are also lawfully in possession. Indeed the very reverse is true. Staples had the horse by the assent of the owner; but he sold him in his own wrong, and in violation of the rights of the plaintiff. The defendant came honestly by the horse, but he did not receive possession of him from any one authorized to give it, and is therefore liable *civilliter* to the true owner for the taking, as well as for the detention.

*Judgment on the verdict.*¹

¹ It is generally agreed, as in the principal case, that an innocent purchase followed by the assumption of possession is a conversion without more, if the seller had no power to transfer the title. *Hurst v. Gwennap*, 2 Stark. 306; *Yates v. Carnsew*, 3 C. & P. 99; *Hilberry v. Hatton*, 2 H. & C. 829; *Fine Art Society v. Union Bank*, 17 Q. B. Div. 706; *McNeill v. Arnold*, 17 Ark. 172; *Robinson v. McDonald*, 2 Ga. 116; *Bane v. Detrick*, 52 Ill. 19; *Chandler v. Ferguson*, 2 Bush, 163; *Galvin v. Bacon*, 11 Me. 28; *Whipple v. Gilpatrick*, 19 Me. 427; *Freeman v. Underwood*, 66 Me. 229; *Rodick v. Coburn*, 68 Me. 170; *Harker v. Dement*, 9 Gill, 7; *Riley v. Boston Co.*, 11 Cush. 11; *Chapman v. Cole*, 12 Gray, 141; *Gilmore v. Newton*, 9 All. 171; *Heckle v. Lurvey*, 101 Mass. 344; *Carter v. Kingman*, 103 Mass. 517; *Bearce v. Bowker*, 115 Mass. 129; *Moody v. Blake*, 117 Mass. 23; *Trudo v. Anderson*, 10 Mich. 357; *Heberling v. Jaggar*, 47 Minn. 70; *Johnson v. White*, 21 Miss. 584; *Whitman Mining Co. v. Tittle*, 4 Neb. 494; *Hyde v. Noble*, 13 N. H. 494; *Lovejoy v. Jones*, 30 N. H. 164; *Cooper v. Newman*, 45 N. H. 339; *Farley v. Lincoln*, 51 N. H. 577; *Surles v. Sweeney*, 11 Oreg. 21; *Carey v. Bright*, 58 Pa. 70; *Riford v. Montgomery*, 7 Vt. 411; *Grant v. King*, 14 Vt. 367; *Buckmaster v. Mower*, 21 Vt. 204; *Courtis v. Cane*, 32 Vt. 232;

THURSTON ET AL. v. BLANCHARD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1839.

[Reported in 22 Pickering, 18.]

TROVER to recover the value of certain goods alleged to have been obtained by the defendant from the plaintiffs by means of false and fraudulent pretences.

The trial was before Putnam, J. It appeared that the goods were purchased of the plaintiffs by the defendant, by means of false representations, on or about the 22d day of March, 1837, for the sum of \$677.77; that the defendant gave his negotiable promissory note for the amount, payable in six months; that such note had been in the possession of the plaintiffs ever since it was given; that they had never offered to give it up to the defendant; and that they had not made a demand upon him for the goods before commencing this suit. The plaintiffs, however, produced the note in court at the trial, and there offered to give it up, or to put it on the files of the court; but the defendant declined taking it, and it was placed on the files.

A verdict was taken for the plaintiffs by consent.

If the court should be of opinion that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.¹

SHAW, C. J., delivered the opinion of the court. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by

Deering v. Austin, 34 Vt. 330; *Bucklin v. Beals*, 38 Vt. 653; *Oleson v. Merrill*, 20 Wis. 462; *Eldred v. Oconto Co.*, 33 Wis. 133; *Beckwith v. Corral*, 2 C. & P. 261 *Accord*.

Parker v. Middlebrook, 24 Conn. 207; *Wood v. Cohen*, 6 Ind. 455 (but see *Rich v. Johnson*, 61 Ind. 246); *Valentine v. Duff*, 7 Ind. Ap. 196; *Stratton v. Allen*, 7 Minn. 502; *Storm v. Livingston*, 6 Johns. 44; *Barrett v. Warren*, 3 Hill, 348; *Pierce v. Van Dyke*, 6 Hill, 613; *Gillet v. Roberts*, 57 N. Y. 28 (qualifying *Wooster v. Sherwood*, 25 N. Y. 278); *Mills-paugh v. Mitchell*, 8 Barb. 333; *Tallman v. Turck*, 26 Barb. 167; *Twinam v. Stewart*, 4 Lans. 263; *Rawley v. Brown*, 18 Hun, 456; *Burckhalter v. Mitchell*, 27 S. Ca. 240; *Houston v. Dyche*, Meigs, 76; *Dunham v. Converse*, 28 Wis. 306 *Contra*.

In some New York cases a distinction is made by which the purchaser's receipt of a chattel upon the delivery of the wrongdoer is not a conversion, whereas his taking without such delivery is a conversion. *Ely v. Ehle*, 3 N. Y. 506; *Fuller v. Lewis*, 13 How. Pr. 219; *Cormier v. Batty*, 41 N. Y. Supr. Ct. 70. This distinction, it may be added, originated in a misconception of early Year-Book cases. Y. B. 2 Edw. IV. fol. 4, pl. 4, and Y. B. 21 Hen. VII. fol. 39, pl. 49. Even where this distinction obtains, the innocent receiver is guilty of a conversion without any demand, if he subsequently deals with the goods as owner, as by selling them and the like. *Pease v. Smith* 61 N. Y. 477.

¹ The arguments of counsel and a part of the case not relating to conversion are omitted. — Ed.

the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action, without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. *Buffinton v. Gerrish.*¹

*Judgment on the verdict for the plaintiffs.*²

M'COMBIE v. DAVIES.

IN THE KING'S BENCH, JUNE 21, 1805.

[Reported in 6 East, 538.]

IN trover for a certain quantity of tobacco, tried at the sittings after Michaelmas term, 1804, at Guildhall, before Lord Ellenborough, C. J.,

¹ 15 Mass. R. 156.

² *Ferguson v. Carrington*, 9 B. & C. 59 (*semble*); *Butters v. Haughwort*, 42 Ill. 18; *Farwell v. Hanchett*, 120 Ill. 573 (overruling *dictum* in *Moriarty v. Stofferan*, 89 Ill. 528); *Parrish v. Thurston*, 87 Ind. 437; *Stevens v. Austin*, 1 Met. 557; *Thayer v. Turner*, 8 Met. 550, 552; *Salisbury v. Gourgas*, 10 Met. 442; *Walker v. Davis*, 1 Gray, 506; *Carl v. McGonigal*, 58 Mich. 567; *Koch v. Lyon*, 82 Mich. 513; *Reeder v. Moore*, 95 Mich. 594; *Holland v. Bishop*, 60 Minn. 23; *Farley v. Lincoln*, 51 N. H. 577, 580, 581; *Moody v. Drown*, 58 N. H. 45; *Cary v. Hotailing*, 1 Hill, 311; *Ladd v. Moore*, 3 Sandf. 589; *Bowen v. Fenner*, 40 Barb. 383; *Solomon v. Van Praag*, 6 Hun, 529; *Baird v. Howard*, 51 Oh. St. 57; *Yeager v. Wallace*, 57 Pa. 365; *Warner v. Vallily*, 13 R. I. 483; *Gage v. Epperson*, 2 Head, 669 *Accord*. But see, *per PARKE, B.*, *Powell v. Hoyland*, 6 Ex. 71, 72: "We also think there was no evidence in the original transaction of any fraud committed by the defendant, so as to enable the plaintiff to recover upon that ground; that is, supposing that if the goods were obtained by fraud, an action of trespass would lie for taking them, which is a very doubtful matter. My impression is, it would not, because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

As the title passes to the fraudulent vendee, it seems clear that an innocent transferee, though a volunteer, is not guilty of a conversion in taking possession of the chattel transferred. *Goodwin v. Worthington*, 99 N. Y. 149; *Nat. Bank v. Hubbell*, 117 N. Y. 384, 398. But see, *contra*, *Farley v. Lincoln*, 51 N. H. 577.

For the same reason, a sheriff, innocently seizing the goods on legal process against the fraudulent vendee, is not thereby guilty of a conversion. *Thompson v. Rose*, 16 Conn. 71; *Goodwin v. Wertheimer*, 99 N. Y. 149; *Wise v. Grant*, 140 N. Y. 593; *Converse v. Sickles*, 74 Hun, 429. But see, *contra*, *Farwell v. Hanchett*, 120 Ill. 573; *Bussing v. Rice*, 2 Cush. 48; *Acker v. Campbell*, 23 Wend. 372. Compare the analogous cases, *Nixon v. Jenkins*, 2 H. Bl. 135; *Billiter v. Young*, 6 E. & B. 1, 10; 8 H. L. C. 682; *Heilbut v. Nevill*, L. R. 5 C. P. 478; *Marks v. Feldman*, L. R. 5 Q. B. 278, 281. — Ed.

the plaintiff was nonsuited, on the ground that there was no conversion by the defendant. A motion was made in Hilary term last to set aside the nonsuit and for a new trial, and the opinion of the court was reserved on the following facts: The plaintiff, a merchant in Aberdeen, had employed one Coddan, an accredited broker in the tobacco trade, and a dealer in tobacco on his own account, to purchase for him some tobacco, which Coddan accordingly did; and the tobacco in question was part of it. But the defendant had no knowledge of the transaction between the plaintiff and Coddan. Coddan, the broker, bought the tobacco in his own name whilst it was in the king's warehouse, and had it transferred to himself in his own name in the king's warehouse, where it remained subject to the payment of the duties, as is usual, till the tobacco is actually delivered out of the warehouse. Coddan, being in want of money, pledged the tobacco in his own name with the defendant for a sum of money, and transferred it into the defendant's name in the king's warehouse.¹ Afterwards an application was made to the defendant, on the part of the plaintiff, for a delivery of the tobacco in question. The defendant answered that he had advanced money to Coddan thereon; that he did not know M'Combie, and could not transfer it but to Coddan's order, and not till his advances were paid. On the 6th and 7th of November the following orders were addressed to the defendant. "B. A. — L 237, 649, 597, 659, 508.

"Mr. Davies, please to deliver to the order of Mr. Thomas M'Combie the above five hogsheads of tobacco, his property.

"Yours, &c.,

"Nov. 6, 1804.

J. R. CODDAN."

"Mr. Davies, I have to request you will immediately deliver to me five hogsheads of tobacco, marked and numbered, &c. (as before); the same being my property, placed in your hands by my broker, J. R. Coddan, whose order for their delivery I now hand you; and have to observe that if you do not deliver them over to me I shall be under the necessity of entering an action against you to enforce their delivery.

"Yours, &c.,

"London, 7th November.

T. M'COMBIE."

The defendant received the said orders, but said that he should not deliver the tobacco until he was paid the money he had advanced on them to Coddan. The tobacco still remains in the king's warehouse, the duties not yet being paid thereon, entered in the books at the king's warehouse in the name of the defendant.

W. Harrison, for the plaintiff. The tobacco was as much in the defendant's possession while it remained in the king's warehouse as if it had been in the custody of a carrier or wharfinger; then his refusing to make the transfer, or give the order for delivering it, was a with-

¹ The Factors Acts would now protect a pledgee under similar circumstances. See *Cole v. N. W. Bank*, L. R. 10 C. P. 364, 367. — Ed.

holding of the tobacco from the rightful owner, and constitutes a conversion; but at any rate the assuming any dominion over it, and taking it by the wrongful act of the broker, was a conversion.

LORD ELLENBOROUGH, C. J., said that the latter was the true ground to put the plaintiff's case upon; and if the case had been so presented to him at the trial there would probably have been no nonsuit; but it was put upon the ground that the not giving of an order for the delivery of the tobacco from the king's warehouse was in itself a conversion, in which I could not concur, not conceiving that the mere not doing of an act was a conversion. But taking the case higher up, upon principle, I think that the defendant's acts amount to a conversion. According to Lord Holt, in *Baldwin v. Cole*, the very assuming to one's self the property and right of disposing of another man's goods is a conversion, and certainly a man is guilty of a conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?

The other judges assented, LAWRENCE and LE BLANC, JJ., observing, that when the defendant was afterwards informed of the plaintiff's rights, and the tobacco was demanded of him, he refused to deliver it.

*Rule absolute for setting aside the nonsuit and granting a new trial.*¹

SPACKMAN AND ANOTHER v. FOSTER.

IN THE QUEEN'S BENCH DIVISION, APRIL 7, 1883.

[*Reported in 11 Queen's Bench Division, 99.*]

THIS was an action tried at the Cambridge Assizes on the 1st of February, 1883, to recover certain title-deeds.

At the trial it appeared that the plaintiffs were jointly entitled to certain land at Cottenham, in the county of Cambridge, the title-deeds of which were in their possession up to October, 1859. At that date John Spackman, a son of one of the plaintiffs, deposited the deeds without their knowledge with the defendant to secure an advance of £100.

GROVE, J.² This was an action brought by the two plaintiffs, who were owners of certain real property, to recover possession of their

¹ In *Krider v. Shaw*, 2 Mass. 398, and *Thacher v. Moors*, 134 Mass. 156, 167, as in the principal case, demand was made of the pledgee before action was brought. In *Hotchkiss v. Hunt*, 49 Me. 213; *Stanley v. Gaylord*, 1 Cush. 536, the pledgee was held guilty of a conversion without any demand, as he was also in *Hartop v. Hoare*, 2 Stra. 1187; *Daubigny v. Duval*, 5 T. R. 604; *Firemen's Co. v. Cochran*, 27 Ala. 228; in which cases it does not appear whether any demand was made before action brought. But see *Union Bank v. Mersey Docks* [1899], 2 Q. B. 205. — ED.

² Only the opinion of the court is given. — ED.

title-deeds. It appears that for a long time they had no occasion to refer to the title-deeds, but that when inquiry was made for them they were found to be in the possession of the defendant, of whom they were demanded, but who refused to give them up. An action was commenced to which the defendant pleaded the Statute of Limitations. The judge at the trial decided in favor of the plaintiffs that the statute had not run against them, but that they were entitled to the deeds, and they accordingly obtained judgment. Afterwards a rule to set aside that judgment was obtained on the ground that the claim was barred by the statute. Several points were raised in argument, but the only one material to our decision is whether the plaintiffs could have brought an action for the detention of the deeds without previously having demanded them. The defendant, when he received these deeds, had no knowledge that the person who pledged them had no title to them. He kept them as deposit or bailee bound to return them on payment of the money he had advanced. He held them against the person who had deposited them, but not against the real owner, and *non constat* that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion. The case most relied on for the defendant was *McCombie v. Davies*. The head-note of that case certainly appears to support the defendant's argument, but there is the great distinction that there was a demand and refusal. Lord Ellenborough says that assuming to oneself the property and right of disposing of another man's goods is a conversion, but that was not the case here, for all that the defendant assumed was the right of safe-keeping against the person depositing till the amount advanced should be repaid, but he did not in any other respect assume to himself the right of disposing of another man's goods which Lord Ellenborough said would amount to conversion. The other judges assented, but the ground of their opinion is added, "that when the defendant was afterwards informed of the plaintiff's rights and the tobacco was demanded of him, he refused to deliver it." On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds. Consequently the ruling of the learned judge at the trial was right, and this rule must be discharged.

*Rule discharged.*¹

STEPHEN and DAY, JJ., concurred.

¹ *Lenthold v. Fairchild*, 35 Minn. 99 *Accord.* — ED.

LORING v. MULCAHY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM, 1862.

[Reported in 3 Allen, 575.]

TORT for the conversion of goods which had been stolen from the plaintiff's shop, and carried to the defendant's house, with his knowledge, and left in his possession, and afterwards taken away and secreted by the same persons who carried them there. At the trial in the Superior Court, Putnam, J., instructed the jury that "if the defendant received these goods into his possession and control, knowing that they were stolen, or that they were not the property of the parties who brought them, and that they came unlawfully by them, it was a conversion by the defendant." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. P. Webster, for the defendant. *L. H. Wakefield*, for the plaintiff.

METCALF, J. These exceptions must be sustained. On the evidence therein stated, the defendant did not convert the goods to his own use, but was a mere depositary thereof, — a naked bailee. He did not assume to dispose of them as if they were his own, nor did he withhold them from the plaintiff on his demand. *Non constat* that he would not readily have restored them to the plaintiff if he had been required so to do. It does not appear that he had any intention to conceal the property from the owner, or that he made any agreement with the bailors to secrete it. In *Simmons v. Lillystone*, Baron Parke says: "In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." See also *Polley v. Lenox Iron Works*, and cases there cited; *Fouldes v. Willoughby*. If, on the evidence in this case and the instructions given to the jury, the defendant was rightly found guilty of converting the goods to his own use, then would an inn-keeper, who should receive into his stable a horse that he knew to be stolen, and should permit the person who brought him there to take him away, be guilty of converting the horse to his own use.

Exceptions sustained.

LEONARD v. TIDD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1841.

[Reported in 3 Metcalf, 6.]

WILDE, J.¹ The only question in this case is, whether the facts proved at the trial do in law constitute a conversion, as charged in the writ. The case is trover for the conversion of a gun, which the defendants admit was the property of the plaintiffs. It was proved that one Jerry Leonard, being indebted to the defendants, delivered the gun to them as security for the debt, and that afterwards the plaintiffs demanded the gun of one of the defendants. But the plaintiffs do not rely on this demand as evidence of a conversion; as the gun, before the demand, had been taken away by said Jerry, with the defendants' consent, and had been sold by him to one Pratt. The only evidence relied on to prove a conversion by the defendants, is the proof that this sale was made with their consent. It was proved that the bargain for the gun was made between the said Jerry and Pratt, and that Pratt agreed to purchase the gun for the sum of five dollars, to be paid to the defendants, if they would consent to take him as paymaster; to which the defendants assented. There was no proof that the defendants had any knowledge that the gun was the plaintiffs' property, or any reason to suppose that it was not the property of Jerry. But it was ruled by the court that this sale, with the permission of the defendants, would be a conversion by them, although they supposed that the gun belonged to Jerry at the time. It is now contended by the plaintiffs' counsel, that the jury had a right to infer from the evidence that the defendants joined in the sale; but we think no such inference can be made; and it is not to be supposed that it was made by the jury. For it was ruled by the court that the assent to the sale by the defendants, and their agreeing to receive the purchase-money, would amount to a conversion. The only evidence against the defendants was, that they received the gun as a pledge from Jerry, and afterwards restored it to him and took other security, and that the gun was sold by Jerry.

The receiving of the gun from the person who had the possession, and restoring it to him, under the circumstances proved, cannot be considered as a tortious act, and does not amount to a conversion.² We think, therefore, on the evidence reported, this action cannot be maintained.

New trial ordered.

¹ Only the opinion of the court is given. — ED.

² *Nat. Bank v. Rymill*, 44 L. T. Rep. 767, per Bramwell, L. J.; *Nelson v. Iverson*, 17 Ala. 216; *Marks v. Robinson*, 82 Ala. 69, 83; *Hudmon v. Dubose*, 85 Ala. 446, 448; *Hill v. Hayes*, 38 Conn. 532; *Parker v. Lombard*, 100 Mass. 405 *Accord*.

See *Rembaugh v. Phipps*, 75 Mo. 422.

In *Hudmon v. Dubose*, *supra*, the defendant, a warehouseman, acting in good faith, received goods on storage from one who had no right to make the bailment, and

THOMAS P. FROME v. ANDREW J. DENNIS.

IN THE SUPREME COURT, NEW JERSEY, NOVEMBER, 1883.

[Reported in 45 New Jersey Reports, 515.]

THE opinion of the court was delivered by

DIXON, J.¹ In August, 1879, the plaintiff left his plough on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plough still being there. In June, 1880, the defendant, a neighboring farmer, borrowed the plough of Hibler to plough a field, supposing the plough to be Hibler's, and having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plough which he had used, and demanded of him pay for the use and the return of the plough or its value, and the defendant not complying, the plaintiff brought an action of trover for the plough. The justice before whom the suit was instituted, and the Common Pleas on appeal, each gave judgment for the plaintiff for the value of the plough. The judgment of the Pleas is now before us on *certiorari*, and the defendant below contends that the foregoing facts proved on the trial did not justify the judgment.

In this contention we agree with the defendant.

In order to maintain an action of trover, it is necessary to prove a conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by Mr. Justice Depue in *Woodside v. Adams*,² in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel."

This subject has quite recently received considerable discussion in the Exchequer Chamber and House of Lords of England, in *Fowler v. Hollins*. The facts upon which the court finally settled as the basis of

subsequently delivered them to the holder of the warehouse receipt to whom the bailor had transferred it. This delivery was held to be a conversion; *Somerville, J.*, saying: "It is insisted in argument, that such shipment is legally tantamount to restoring the cotton to the possession of the bailor. The rule, in our judgment, cannot be construed to go this far. The exception in question only embraces the act of restoring the thing bailed to the mere possession of the bailor, — a substantial restoration of the original *status in quo* of the property. It does not include a restoration of the bailor's dominion by an act, the essential nature of which is in defiance of the true owner's title, or the probable consequence of which will be to put the property beyond his reach. And such is the act of conversion here imputed to the appellants." See, however, *Parker v. Lombard*, *supra*. — ED.

¹ Only the opinion of the court is given. — ED.

² 11 Vroom, 417.

decision, made the case a plain one of conversion. They were, that one Bayley had fraudulently come into possession of thirteen bales of cotton belonging to the plaintiff, and had sold and delivered them to the defendant, who bought in good faith, and who then sold and delivered them in good faith to Michols & Co. Here was clearly an exercise of dominion over the goods by the defendant inconsistent with the plaintiff's right. But in the course of the cause some of the judges thought that, according to the case reserved, the defendant, in the transfer from Bayley to Micholls & Co., dealt only as broker and agent of the latter, and in examining the goods, receiving them from Bayley and forwarding them to Micholls & Co., acted without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another; and so the question was raised, whether such a possession of the goods and such an asportation amounted, in law, to a conversion. Many of the English cases were commented on at length by Mr. Justice Brett, in both tribunals, and he insisted, with great force and clearness, upon a negative response. Byles, J., and Kelly, C. B., expressly concurred in this opinion, and the other judges in the Exchequer Chamber seem not to have disagreed with it in point of law, but they rested their conclusion upon a different view of the facts. In the House of Lords, Mr. Justice Blackburn expressed his opinion that the defendant was liable, because he both entered into a contract with Bayley, and also assisted in changing the custody of the goods, and so knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls & Co. that they might dispose of them as their own. This he deemed a conversion by the defendant, no matter whether he acted as broker or not. In the course of his remarks he lays down the principle that one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused from what he does, if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody. He concedes, moreover, that this is not the extreme limit of the excuse, and doubts whether it would be a conversion for a miller to grind grain into flour and return the flour to the person who brought the grain, before he heard of the true owner. Under the definition of Mr. Justice Depue, above quoted, this act of the miller would be a conversion, because it changed the quality of the owner's goods. Mr. Baron Cleasby, while concurring with those who looked upon the defendant as a principal, and therefore guilty, says with reference to this view, that he was a broker merely: "How far the intermeddling with the goods themselves by delivering them would" involve a broker in responsibility to the owner, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in such case could be regarded as having an inde-

pendent possession of the goods and delivering them for the purpose of passing the property." Mr. Justice Grove advised the house in favor of the plaintiff, on the ground that the defendant intermeddled with goods which were not his own, and exercised a dominion over them inconsistent with the right of the true owner. Mr. Baron Amphlett concurred with Brett; Lord Chelmsford, Chancellor Cairns, Lords Hatherley and O'Hagan advised for the plaintiff in substance, because the defendant had exercised dominion over the plaintiff's property by disposing of it to Micholls & Co.

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i. e.*, ownership over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged.

In a very late case in Massachusetts, *Spooner v. Manchester*, a similar view is expressed. . . .¹

To the same effect is *Laverty v. Snethen*.²

In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plough. He received it for a temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right, or any exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion.

This being so, his subsequent failure to deliver the plough to the plaintiff on demand, was not evidence of a conversion, for the reason that delivery was then impossible to him. He did not *refuse* to deliver, but could not. *Ross v. Johnson*; *Salt Springs Bank v. Wheeler*; ³ *Maguin v. Dinsmore*.⁴

The judgment below should be reversed.

¹ The learned judge here gave a long extract from the opinion of Field, J., *infra*, p. 300. — Ed.

² 68 N. Y. 522.

³ 48 N. Y. 492.

⁴ 70 N. Y. 410.

SECTION II. (*continued.*)

(c) MISFEASANCE BY BAILEE.

POWELL v. SADLER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., 1806.

[*Reported in Paley, Principal and Agent (3d edition), 80.*]

TROVER for three horses. Plaintiff had sent the horses to defendant to be sold the next day; defendant's clerk told him the next day would not be so good a time to sell them as the following sale day; in consequence of which the plaintiff said he would send for them back again, which he did the next evening, but they had been sold. In a conversation concerning the sale, the defendant said, "it was a mistake of his clerk, for which he was not answerable." *Garrow*, for the defendant, insisted that there was no evidence of a conversion. LORD ELLENBOROUGH, C. J. I am of opinion that a conversion has been proved; the horses were intrusted to the defendant for a qualified purpose, which he had admitted was not conformed to. Where goods are committed to one for a qualified purpose, any deviation from it in the disposition of them is a conversion; "as if a man borrow a horse to ride, and leave him at an inn, it has been held to be a conversion."¹

¹ *Loeschman v. Machin*, 2 Stark. 311; *Samuel v. Morris*, 6 C. & P. 620; *Cooper v. Willomatt*, 1 C. B. 672; *Van Amringe v. Peabody*, 1 Mason, 440; *Blakeley v. Ruddell*, Hempst, 18; *St. John v. O'Connell*, 7 Port. 468; *Cartlidge v. Sloan*, 124 Ala. 596; *Ledbetter v. Thomas*, 130 Ala. 299; *Robinson v. Hartridge*, 13 Fla. 501; *Yeldell v. Shinholster*, 15 Ga. 189; *Seago v. Pomeroy*, 46 Ga. 227; *Haas v. Damon*, 9 Iowa, 589; *White v. Wall*, 40 Me. 574; *Webber v. Davis*, 44 Me. 147; *Carpenter v. Hale*, 8 Gray, 157; *Simpson v. Carleton*, 1 All. 109; *Carroll v. McCleary*, 19 Mich. 93; *Johnston v. Whittemore*, 27 Mich. 463; *White v. Phelps*, 12 N. H. 382; *Murray v. Burling*, 10 Johns. 172; *Kennedy v. Strong*, 14 Johns. 128; *Chandler v. Belden*, 18 Johns. 157; *Bates v. Conkling*, 10 Wend. 389; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Campbell v. Parker*, 9 Bosw. 322; *Jaroslauski v. Saunderson*, 1 Daly, 232; *Covell v. Hill*, 6 N. Y. 374; *Boyce v. Brockway*, 31 N. Y. 490; *Scott v. Rogers*, 31 N. Y. 676; *Strong v. Nat. Mec. Bank Assoc.*, 45 N. Y. 718; *Pease v. Smith*, 61 N. Y. 477; *Lavery v. Snethen*, 68 N. Y. 522; *Comley v. Dazian*, 114 N. Y. 161; *Ogden v. Lathrop*, 35 N. Y. Superior Ct. R. 73; *Hope v. Lawrence*, 1 Hun, 317; *Carraway v. Burbank*, 1 Dev. 306; *Etter v. Bailey*, 8 Penn. 442; *Harris v. Saunders*, 2 Strobb. Eq. 370; *Garvin v. Luttrell*, 10 Humph. 16; *Ainsworth v. Bowen*, 9 Wis. 348; *Couillard v. Johnson*, 24 Wis. 533 *Accord. Conf. Downer v. Rowell*, 24 Vt. 343. — Ed.

But a sale by an agent at a price other than that authorized by the principal is not a conversion. *Dufresne v. Hutchinson*, 3 Taunt. 117; *Marr v. Barrett*, 41 Me. 403 (*semble*); *Bissell v. Huntington*, 2 N. H. 142; *Cairnes v. Bleecker*, 12 Johns. 300; *Sarjeant v. Blunt*, 16 Johns. 74; *Lochwood v. Ball*, 1 Cow. 322, 329; *Lavery v. Snethen*, 68 N. Y. 522, 526; *Comley v. Dazian*, 114 N. Y. 161, 165, 166; *Moore v. McKibbin*, 33 Barb. 246; *Aylesbury Co. v. Fitch* (Okla. 1908), 99 Pac. R. 1089; *Libley v. Story*, 8 Vt. 15 *Accord.*

Compare *Palmer v. Jarmain*, 2 M. & W. 282; *Stierneld v. Holden*, 4 B. & C. 5; *Harris v. Schultz*, 40 Barb. 315.

A wrongful pledge is a conversion. *Stevens v. Ames*, 22 N. H. 568; *Nichols v. Gage*, 10 Oreg. 92. — Ed.

A. J. PERHAM AND ANOTHER v. CHARLES W. H. CONEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 19, 1875.

[Reported in 117 *Massachusetts Reports*, 102.]

TORT for negligence in the use of a horse and carriage hired by the defendant of the plaintiff; with a count for the conversion of the same.

The judge instructed the jury as follows: ¹—

“The burden of proof is upon the plaintiff to prove in order to recover one or the other of the following propositions:—

“1. If the plaintiffs and defendant made a contract, by which the defendant hired the plaintiffs' horse and carriage for use in driving to and from Lynnfield only, and in violation of that contract, the defendant drove the plaintiff's horse and carriage to Lynnfield and from thence several miles to Peabody, he became thereby responsible to the plaintiff for any injury to such horse and buggy in Peabody or while driving from Lynnfield to Peabody. Whether or not such injury was caused by any want of ordinary care or skill of the defendant in driving the horse and carriage from Lynnfield to Peabody, or in tying or managing the horse and carriage in Peabody, or by any insufficiency of the harness of said horse, or any physical infirmity, or want of docility of the horse, would be immaterial, as the defendant's use of the horse and carriage, in driving beyond Lynnfield in violation of his contract, was a conversion of such horse and carriage, in the nature of an original unlawful taking of such horse and carriage, at the time of the defendant's leaving Lynnfield, and such conversion caused the defendant to be liable in damages to the plaintiff therefor, equal to the difference between the value of such horse and carriage at the time it was taken by the defendant from Lynnfield, and the value of the same when restored by the defendant to the plaintiff. Accepting pay for the use of the horse under such a contract was a waiver of the conversion.

“2. If the plaintiffs and the defendant made a contract by which the defendant hired the plaintiffs' horse and carriage for use in driving for pleasure for a time and distance not fixed or agreed upon by them, the defendant rightfully drove the horse to Lynnfield and thence to Peabody, and was responsible to the plaintiff for any injury to such horse or carriage, which was caused by the defendant's want of ordinary care and skill in driving or managing such horse and carriage in Peabody to be determined in view of the fact known by the plaintiffs, and presumed to have been considered by them in letting the horse, that the defendant was a one-armed man; but was not responsible for any injury to such horse and carriage caused by the insufficiency of the plaintiffs' harness for driving or tying the horse, or by reason of any disease, or

¹ Certain instructions requested by the defendant, but refused, are omitted, as well as the arguments of counsel and a statement of the evidence. — Ed.

physical infirmity, or want of docility of the horse, or by any peculiar habits or dispositions of the horse when tied, unless the defendant was notified of such peculiar habits and dispositions."

The jury found for the plaintiffs, and to the rulings and refusals to rule as requested the defendant alleged exceptions.

A. V. Lynde, for the defendant.

C. W. Eaton and *S. K. Hamilton*, for the plaintiffs.

By THE COURT. The instructions given were in accordance with the law as settled in the cases cited by the counsel on both sides, and accurately and sufficiently covered all the questions at issue. The first paragraph of the instructions applied to the count for a conversion of the horse, and the second to the count for negligence.

*Exceptions overruled.*¹

R. L. SPOONER v. ANDREW J. MANCHESTER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPT. 7, 1882.

[*Reported in 133 Massachusetts Reports, 270.*]

FIELD, J.* This case apparently falls within the decision in *Hall v. Corcoran*,³ except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after traveling on it five or six miles, he discovered his mistake, he intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due

¹ *Hooks v. Smith*, 18 Ala. 338; *Moseley v. Wilkinson*, 24 Ala. 411; *Fail v. McArthur*, 31 Ala. 26; *Frost v. Plumb*, 40 Conn. 111; *Mayor v. Howard*, 6 Ga. 219; *Phillips v. Brigham*, 26 Ga. 617; *Kelly v. White*, 17 B. Monr. 131; *Ripley v. Dolbier*, 18 Me. 382; *Morton v. Gloster*, 46 Me. 520; *Wheelock v. Wheelwright*, 5 Mass. 104; *Homer v. Thwing*, 3 Pick. 492; *Rotch v. Hawes*, 12 Pick. 136; *Lucas v. Trumbull*, 15 Gray, 306; *Hall v. Corcoran*, 107 Mass. 251; *Fisher v. Kyle*, 27 Mich. 454; *Woodman v. Hubbard*, 25 N. H. 67; *Beach v. R. R. Co.*, 37 N. Y. 457; *Roe v. Campbell*, 40 Hun, 49, 52; *Fish v. Ferris*, 5 Duer, 49; *Disbrow v. Tenbroeck*, 4 E. D. Sm. 397; *Angus v. Dickerson*, Meigs, 459; *Horsely v. Branch*, 1 Humph. 199; *Mullen v. Ensley*, 8 Humph. 423; *Price v. Allen*, 9 Humph. 703; *Bell v. Cummings*, 3 Sneed, 275; *Rice v. Clark*, 8 Vt. 109; *Hart v. Skinner*, 16 Vt. 138; *Towne v. Wiley*, 23 Vt. 355; *Spencer v. Pilcher*, 8 Leigh, 565; *Harvey v. Epes*, 12 Gratt. 153 *Accord.* — Ed.

* Only the opinion of the court is given. — Ed.

³ 107 Mass. 251.

care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion, is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney*.

The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes*, Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes v. Willoughby* is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons v. Lillystone*; *Wilson v. McLaughlin*.¹

It is argued that the act of the defendant in this case was a user of

¹ 107 Mass. 587.

the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake in taking the wrong road was immaterial, and these cases are cited: *Wheelock v. Wheelwright*,¹ *Homer v. Thwing*,² *Lucas v. Trumbull*,³ *Hall v. Corcoran*, *ubi supra*. In each of these cases, there was an intentional act of dominion exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington v. Wentworth*,⁴ a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June, 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

*Parker v. Lombard*⁵ and *Loring v. Mulcahy* were both decided upon the ground that the defendant either assumed to dispose of the property as his own, or intended to withhold the property from the plaintiff.

*Nelson v. Whetmore*⁷ was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore v. Newton*⁸ the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Fouldes v. Willoughby*, *Wilson v. McLaughlin*,⁹ *Nelson v. Merriam*,¹⁰ *Houghton v. Butler*,¹¹ *Heald v. Carey*.¹²

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester, a longer distance than was contemplated, and on a different

¹ 5 Mass. 104.

⁴ 107 Mass. 251.

⁷ 1 Rich. 318.

²⁰ 4 Pick. 249.

² 3 Pick. 492.

⁸ 8 Met. 548.

⁹ 9 Allen, 171.

¹¹ 4 T. R. 364.

⁵ 15 Gray, 306.

⁶ 100 Mass. 405.

⁹ 107 Mass. 587.

¹² 11 C. B. 977.

road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.

Exceptions sustained.

JONATHAN WENTWORTH v. GEORGE A. McDUFFIE.

IN THE SUPREME COURT, NEW HAMPSHIRE, JUNE, 1869.

[Reported in 48 New Hampshire Reports, 402.]

SMITH, J. II.¹ The jury were instructed that "if the defendant wilfully and intentionally drove the mare at such an immoderate and violent rate of speed as seriously to endanger her life, and he was at the same time aware of the danger, and her death was caused thereby, it would be such a tortious act as would amount to a conversion, and trover might be maintained; though it would be otherwise if the fast driving was the result of mere negligence and want of discretion, he not being aware that it endangered the safety or life of the mare."

Two established principles of the law of trover tend to support this instruction. The first is the settled rule in this State, that if the owner of a horse let him to be driven to one place, and the hirer voluntarily drives him beyond that place to another, this is a conversion of the horse, for which the owner may maintain trover against the hirer. *Woodman v. Hubbard*.² This doctrine does not seem to proceed upon the idea that the driving the horse beyond the place named in the contract is conclusive evidence of the bailee's intention to convert the animal to his own use, but rather upon the ground that such use of the property is so substantial an invasion of the owner's rights, and so inconsistent

¹ Only the opinion of the court on the second point is given. — Ed.

² 25 N. H. 67.

with the idea of an existing bailment, that the bailee cannot reasonably object to the bailor's treating the bailment as terminated thereby or to his proceeding against the bailee for a conversion. "A conversion consists in an illegal control of the thing converted, inconsistent with the plaintiff's right of property." Perley, J.¹ It has been said that, "if the thing be put to a different use from that for which it was bailed," the bailor may maintain trespass or trover, but that "any misuser or abuse of the thing bailed, in the particular use for which the bailment was made, will not enable the general owner to maintain trespass or trover against the bailee." Redfield, J., in *Swift v. Mosely*.² But we are unable to perceive any just ground for the distinction as stated in these broad terms. If a horse is hired upon the usual implied contract that he is to be driven at a safe rate of speed, the act of the bailee in wilfully and intentionally driving the horse at such an immoderate rate of speed as he knew would seriously endanger the life of the horse is at least as marked an assumption of ownership and as substantial an invasion of the bailor's right of property as the act of driving the horse at a moderate speed one mile beyond the place named in the contract of hiring. The probability of injury to the horse is much greater in the former case, and the cruel treatment of the horse is certainly as inconsistent with the continued existence of the contract of bailment as the use of the horse for a different journey.

The other established principle which tends to support this instruction is the doctrine that the wilful destruction by the bailee of the thing bailed is a conversion. See *Morse v. Crawford*.³ If the death of the mare was caused by an act wilfully and intentionally done by the bailee with knowledge on his part that the life of the mare was thereby seriously endangered, we think that, so far as the civil remedy is concerned, the bailee may be regarded as having wilfully destroyed the mare. If the property is destroyed by the bailee's wilful act the bailor's right to maintain trover cannot depend upon the time when the destruction is consummated. "It can make no difference whether the destruction takes place immediately on the commission of the act, or is the necessary result of it." If the bailor had seen that his mare was about to be destroyed by the bailee's wilful act he would have been entitled to terminate the bailment, and retake his property if he could do it without force. When the bailor learns that an act has already been done which will result in the death of the mare, can he not elect to consider the bailment as having been rescinded by the act at the moment of its commission?

It may be urged that the principles referred to as sustaining the instructions are themselves arbitrary exceptions engrafted on the law of trover, and that they therefore do not furnish a foundation upon which to reason from analogy. If we are to look merely to the form of the declaration, very few of the actions of trover now brought would be

¹ 25 N. H. p. 71.

² 10 Vt. 208, p. 10.

³ 17 Vt. 499.

sustained. The legal fictions which prevail in reference to trover are based upon authority; and however arbitrary the established principles may be, we know of no other test by which to decide any question pertaining to the form of action which has not already been conclusively settled by authority.

The right of a bailor to maintain trespass or trover against a bailee in a case like that supposed in the instructions is a question not conclusively settled by authorities directly in point. *Rotch v. Hawes*¹ seems favorable to the defendant. *McNeill v. Brooks*² is cited on the same side, but an examination of the opinion shows that the court did not have in mind such a wilful and intentional misuse as that described in the instructions given in the present case. *Swift v. Moseley*³ contains a *dictum* favorable to the defendant, but the case itself is not in point; see also *Harris, J.*, in *Parker v. Thompson*.⁴ On the other hand, *Maguyer v. Hawthorn*⁵ tends to sustain the plaintiff; as do also *Campbell v. Stakes*,⁶ and *Nelson v. Bondurant*,⁷ reaffirmed in *Hall v. Goodson*; see also *James v. Carper*.⁸ We think the instructions were correct.

*Judgment on the verdict.*¹⁰

YOUL v. HARBOTTLE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 7, 1791.

[Reported in 1 Peake, 49.]

TROVER for goods. The plaintiff had put the goods in question on board the defendant's packet-boat, to be carried from London to Gravesend. Another person coming to the defendant's house, and saying that these goods belonged to him, the defendant, under a mistake, delivered them to him.

Mingay, for the defendant, objected that upon this evidence the plaintiff must be nonsuited. Here was no evidence of a conversion; and though the defendant was liable to a special action on the case, yet trover could not be supported.

Erskine relied on the case of *Syeds and Another v. Hay*,¹¹ determined

¹ 12 Pick. 136.

² 10 Vt. 208.

³ 2 Harrington, 71.

⁴ 26 Ala. 341.

⁵ 4 Sneed, 397.

⁶ 1 Yerger, 73.

⁷ 5 Sneed, 349, p. 352.

⁸ 2 Wend. 137.

⁹ 32 Ala. 277.

¹⁰ *Nelson v. Bondurant*, 26 Ala. 341; *Hall v. Goodson*, 32 Ala. 277; *Maguyer v. Hawthorn*, 2 Harrington, 71; *Campbell v. Stakes*, 2 Wend. 137 *Accord*.

McNeill v. Brooks, 1 Yerg. 73 (*semble*); *Parker v. Thompson*, 5 Sneed, 349 (*semble*); *Swift v. Moseley*, 10 Vt. 208 (*semble*) *Contra*. — *Ed*.

¹¹ 4 T. R. 260.

last term, which, he said, showed this act of the defendant to be a conversion.

LORD KENTON. That case was determined on such peculiar circumstances, that it is hardly possible it should ever apply as an authority in a case not exactly parallel with it. I agree that when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained.

Verdict for plaintiff.

DEVEREUX v. BARCLAY.

IN THE KING'S BENCH, JUNE 16, 1819.

[*Reported in 2 Barnewall & Alderson, 702.*]

TROVER for oil. Plea: Not guilty. At the trial at the adjourned sittings before last Hilary term at Guildhall, before Abbott, C. J., the plaintiffs proved a purchase of four tuns of sperm oil, then lying at the defendants' warehouses, from a person of the name of Collinson. The following delivery order was given, dated 13th February, 1818:

"To Messrs. A. & W. BARCLAY, Leicester Square. — Please to deliver to the order of Messrs. Devereux and Lambert, the undermentioned goods (enumerating them). Charges from 27th February to be paid by Messrs. Devereux & Co. EDWARD COLLINSON."

Soon after this transaction, Collinson, who had in the mean time purchased from Mr. Gamon, a broker, without the defendants' knowledge some dark sperm oil of inferior value, then also lying at the defendants' warehouse, sold this latter quantity, about three tuns, to a third person, and gave the following delivery order, dated 3d March, 1818: — "To Messrs. A. & H. Barclay. Please to deliver to Mr. Dale's carts my dark sperm oil." The defendants, not being aware that the two parcels of oil both belonged to Collinson, by mistake delivered the first parcel of oil to the second delivery order, the first delivery order not having been at that time presented to them by the plaintiffs. The plaintiffs, on the 28th March, presented their delivery order and demanded the oil. Abbott, C. J., being of opinion that this misdelivery, by mistake, did not amount to a conversion so as to entitle the plaintiffs to maintain trover, directed a nonsuit. A rule *nisi* for a new trial having been obtained,

Scarlett and *Manning* now showed cause.¹

Gurney and *Jones*, contra, were stopped by the court.

ABBOTT, C. J. What effect the production of further evidence may have, the court cannot anticipate at present; it is quite sufficient to

¹ The argument for the defendant is omitted. — Ed.

say that this cause having been stopped too soon, the plaintiffs are entitled to a new trial. This is not the case of an innocent delivery, for it is one contrary to the knowledge which, in point of law, the defendants ought to have had. There is a great distinction between an omission and an act done. In the case cited from Burrow no act was done, and Lord Mansfield expressly said that it was a mere omission. But here there is an act done by the defendants, which, in its consequences, is injurious to the plaintiff. Upon this evidence, therefore, I am now of opinion that trover may be maintained.

BATLEY, J. The case of *Youl v. Harbottle* shows that a carrier is liable in trover for a misdelivery.

HOLROYD and BEST, JJ., concurred.

*Rule absolute.*¹

¹ *Duffe v. Budd*, 3 B. & B. 177; *Syeds v. Hay*, 4 T. R. 260; *Mills v. Ball*, 2 B. & P. 487; *Lubbock v. Inglis*, 1 Stark. 104; *Stephenson v. Hart*, 4 Bing. 476; *Wyld v. Pickard*, 8 M. & W. 443; *Glyn v. E. I. Co.*, 5 Q. B. D. 129; *Union Bank v. Mersey Docks* [1899], 2 Q. B. 205; *Bullard v. Young*, 3 Stew. 46; *Ala. Co. v. Kidd*, 35 Ala. 200; *Louisville Co. v. Barkhouse*, 100 Ala. 543; *Adams v. Blakenstein*, 2 Cal. 413; *Hanna v. Flint*, 14 Cal. 73; *Southern Co. v. Palmer*, 48 Ga. 94; *Ill. Co. v. Parks*, 54 Ill. 294; *Indianapolis Co. v. Herndon*, 81 Ill. 143; *Merch. Co. v. Merriam*, 111 Ind. 5; *Clafin v. Boston Co.*, 7 All. 341; *Odell v. Boston Co.*, 109 Mass. 50; *Jenkins v. Bacon*, 111 Mass. 373; *Newcomb v. Boston Co.*, 115 Mass. 230; *Alderman v. Eastern Co.*, 115 Mass. 233; *Libby v. Ingalls*, 124 Mass. 503; *Aborn v. Merchants Co.*, 135 Mass. 283; *Edwards v. Frank*, 40 Mich. 616; *Hicks v. Lyle*, 46 Mich. 488; *Gibbons v. Farwell*, 63 Mich. 344; *Smith v. Bell*, 9 Mo. 873; *Dufour v. Mephram*, 31 Mo. 577; *Marshall Co. v. Railway Co.*, 176 Mo. 480; *Nat. Bank v. So. Co.* (Mo. Ap. 1909) 115 S. W. R. 516; *Ostrander v. Brown*, 15 Johns. 39; *Powell v. Myers*, 26 Wend. 591; *Lockwood v. Bull*, 1 Cow. 322; *Willard v. Bridge*, 4 Barb. 361; *Esmay v. Fanning*, 9 Barb. 176; *Coykendall v. Eaton*, 55 Barb. 188; *Guillaume v. Packet Co.*, 42 N. Y. 212; *Viner v. N. Y. Co.*, 50 N. Y. 23; *Price v. Oswego*, 50 N. Y. 213; *Bush v. Romer*, 2 Th. & C. 597; *Compton v. Shaw*, 3 Th. & C. 761; *Colgate v. Pa. Co.*, 31 Hun, 297; *Baltimore Co. v. O'Donnell*, 49 Oh. St. 489; *Graves v. Smith*, 14 Wis. 5 Accord.

Compare *Heugh v. London Co.*, L. R. 5 Ex. 51; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *The Drew*, 15 Fed. Rep. 826; *Hills v. Snell*, 104 Mass. 173; *Samuel v. Cheney*, 135 Mass. 278; *Edmunds v. Merch. Co.*, 135 Mass. 283; *Wilson v. Adams Co.*, 27 Mo. Ap. 360, in which cases there was in fact no misdelivery.

As an original question there is great difficulty in treating a misdelivery by a carrier, by mistake, as a conversion. There is certainly much force in the following observations of Martin, B., in *Crouch v. Great North Co.*, 11 Ex. 742, 757: "If the question of an action of trover against a carrier for misdelivery were to be considered now, for the first time, the courts would probably hold, that trover was not maintainable. In *Fouldes v. Willoughby*, 8 M. & W. 810, the subject of conversion, and the right to maintain trover, is dealt with, and the law is laid down by this court in a way which has been acted upon ever since, and most satisfactorily. I allude especially to the judgment of my Brother Alderson; and if his view be correct, as I believe it to be, it utterly excludes the case of misdelivery by a carrier as a conversion." — ED.

SECTION II. (*continued.*)

(f) DEFENDANT ACTING AS AGENT OR INTERMEDIARY.

PARKER AND ANOTHER v. GODIN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1728.

[*Reported in 2 Strange, 813.*]

SATUR, a bankrupt, at the time of his going off left some plate with his wife, who, in order to raise money upon it, delivered it to her servant, who went along with the defendant to the door of Mr. Woodward the banker, and there the defendant took the plate into his hands and went into the shop and pawned it in his own name, gave his own note to repay the money, and immediately upon receipt of it went back to the bankrupt's wife and delivered the money to her. And in trover for the plate the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use. And upon a second trial the plaintiff obtained a verdict for the value of the plate.

PERKINS v. SMITH.

IN THE KING'S BENCH, TRINITY TERM, 1752.

[*Reported in 1 Wilson, 328.*]

IN trover, the jury find a special verdict, which, in substance, is shortly this: that upon the 22d of September, 1749, Hughes was possessed of the goods in the declaration as his own property, and became a bankrupt that day; that the plaintiff is assignee under the commission; that upon the 23d of September, 1749, the defendant Smith, who is servant and riding-clerk to Mr. Garraway, to whom the bankrupt was considerably indebted, went to the bankrupt's shop (to try to get his master's money), and found it shut up; and that the bankrupt delivered to Smith the goods in the declaration, who gave a receipt for the same in the name of his master, and sold the same for his master's use.

It was objected that the action was improperly brought against the servant Smith, who acted wholly in this matter for his master, and that the conversion is found to be to the use of his master, which is the

gist of an action of trover. After two arguments at the bar, the court gave judgment for the plaintiff.

LEE, C. J. The point is, whether the defendant is not a tortfeasor; for if he is so, no authority that he can derive from his master can excuse him from being liable in this action.

Hughes, the bankrupt, had no right to deliver these goods to Smith; the gist of trover is the detainer or disposal of goods (which are the property of another) wrongfully; and it is found that the defendant himself disposed of them to his master's use, which his master could give him no authority to do; and this is a conversion in Smith, this disposal being his own tortious act; the act of selling the goods is the conversion, and whether to the use of himself or another it makes no difference. I am very well satisfied that this servant has done wrong, and that no authority that could be derived from his master before or after the fact can excuse him.

The finding that the defendant disposed of the goods for his master's use is only the conclusion of the jury, and does not bind the court, the taking upon him to dispose of another's property is the tortious act, and the gist of this action.

Judgment for the plaintiff per totam curiam.

STEPHENS AND OTHERS, ASSIGNEES OF SPENSER AND ANOTHER,
BANKRUPTS, v. ELWALL.

IN THE KING'S BENCH, JUNE 5, 1815.

[Reported in 4 Maule & Selwyn, 259.]

TROVER for goods. Plea: Not guilty. At the trial before Le Blanc, J., at the last Lancaster assizes, the case was this:—

The bankrupts, being possessed of the goods in question, sold them after their bankruptcy to one Deane, to be paid for by bills on Heathcote, who had a house of trade in London, and for whom Deane bought the goods. Heathcote was in America, and the defendant was his clerk, and conducted the business of the house. Deane communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to America to Heathcote. No demand was made upon the defendant until nearly two years after the purchase. The learned judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of Heathcote he was not liable; but if he was transacting business for himself, though in the name of another, then he would be liable. The jury found a verdict for the defendant. And upon a rule nisi obtained in the last term for a new trial, in order to question the accuracy of the learned judge's

direction in point of law, *Perkins v. Smith* was cited, and it was contended that the defendant being a tortfeasor, no authority that he could derive from his master would excuse him from being liable in this action.

Park, who now showed cause, referred to the report of *Perkins v. Smith*, in *Sayer*, 40, and said, that the decision went too far, and that it had not been approved of by *Lawrence, J.*, when cited to him on the western circuit, and he took this difference, that there the defendant received the goods with knowledge that the bankrupt had absconded and shut up shop. But in this case no demand was made until two years after the purchase; therefore it would be a great hardship if the defendant were to be liable in respect of a demand, which from the lapse of time it is impossible to comply with.

*Topping and Richardson, contra.*¹

LORD ELLENBOROUGH, C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC, J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for *Heathcote* or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

*Per Curiam. Rule absolute.*²

¹ The argument for the plaintiff is omitted. — ED.

² *Cranch v. White*, 1 B. N. C. 414; *Davies v. Vernon*, 6 Q. B. 443; *McEntire v. Potter*, 22 Q. B. D. 438; *Winter v. Banks*, 17 T. L. R. 446, 49 W. R. 574, s. c.; *Edgerly v. Whalan*, 106 Mass. 307; *Flanders v. Colby*, 28 N. H. 34; *Thorpe v. Burling*, 11 Johns. 285; *Elmore v. Brooks*, 6 Heisk. 45 *Accord.* — ED.

GREENWAY AND ANOTHER v. FISHER.

AT NISI PRIUS, CORAM ABBOTT, C. J., APRIL 20, 1824.

[Reported in 1 *Carrington & Payne*, 190.]

TROVER for calico, which the plaintiffs had intrusted for sale to John and Henry Eccles, who had pledged it with the defendants for money lent.¹

It appeared that one of the defendants, named Woodward, was a packer, who merely shipped the goods, and though he made affidavit at the custom-house that he was the real owner, yet it appeared that it was the common practice for packers to do so, they considering themselves to have a special property in the goods at the time of shipment.

On his part, therefore, it was submitted that he was not liable in an action of trover, inasmuch as he only acted in the regular discharge of his duty; and the work being done according to directions, no wrong in the transaction between other parties would affect him. If it were not so, every porter and every carrier would be liable, as well as a packer.

For the plaintiff it was replied: All persons who are parties to the conversion are liable. It is so in trespass. The question is, whether Woodward is or is not, by law, a party to the conversion. If the goods still remain the property of the plaintiffs, the packer is liable. It is clear that if a pipe of wine were obtained by a person and bottled off by his servant, and sent out, trover would lie against both. The case of *Stephens v. Elwall* was cited.

ABBOTT, C. J. On the part of Woodward reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and refusal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not liable.²

The fact of a pledge to the other defendants was made out to the satisfaction of the jury.

*Verdict for the plaintiffs against all except Woodward.*³

¹ A part of the case relating to evidence is omitted. — Ed.

² *Sheridan v. New Quay Co.*, 4 C. B. N. S. 618, 648; *Gurley v. Armstead*, 148 Mass. 267; *Hanson v. Jacob*, 93 Mo. 331 *Accord.* — Ed.

³ *Leuthold v. Fairchild*, 35 Minn. 99 (wheat-inspector innocently assisting the owner of an elevator in making a wrongful shipment; see also *Fern v. Leuthold*, 39 Minn. 212, 217) *Accord.*

See *Lee v. Bayes*, 18 C. B. 609, *per* Willes, J.; *Ganly v. Ledridge*, Ir. R. 10 C. L. 83, 40–41, 45, 46. — Ed.

FRANCIS HOLLINS AND OTHERS, APPELLANTS, v. GEORGE
FOWLER AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MAY 7, JULY 6, 1875.

[*Reported in Law Reports, 7 House of Lords, 751.*]

THIS was an appeal on a case stated, on which the Court of Queen's Bench had given judgment for Fowlers, the plaintiffs in the action, which judgment had been affirmed in the Exchequer Chamber.¹

Fowler & Co. were merchants at Liverpool. Hollins & Co. carried on the business of cotton brokers there.

In December, 1869, Fowler & Co. instructed their brokers, Messrs. Rew, to sell for them thirteen bales of cotton. A person named Hill, a clerk to H. K. Bayley, a cotton broker at Liverpool, proposed a purchase on his master's account. Messrs. Rew refused to sell unless the name of a responsible person was given as the purchaser. Hill then said that Bayley was buying as a broker for Thomas Seddon, of Bolton. The inquiries as to Mr. Seddon being quite satisfactory, Messrs. Rew forwarded to Fowlers, their principals, a sold note, in these terms: "Liverpool, Dec. 18, 1869. Messrs. Fowler Brothers. We have this day sold on your account the undermentioned cotton." Then came the description, "Thirteen bales — American — at 12*d.*, per Minnesota," and the buyer's name was given thus: "Thomas Seddon, *per* H. K. Bayley." The payment was to be "cash within ten days, less 1½ per cent discount." A counterpart of this note was sent to Bayley himself. On the same day Bayley sent to Messrs. Rew a sampling and delivery order, and the bales were delivered to him, and removed to his warehouse. On the same day, also, Messrs. Rew sent to Bayley the following note: "Mr. Thomas Seddon, *per* Messrs. H. K. Bayley & Co. Bought from Fowler Brothers, *per* Rew & Freeman, brokers, 13 bales American cotton, *ex* Minnesota, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash, within ten days, less 1½ per cent discount."

On the 28*d* of December, H. K. Bayley, being thus in possession of the cotton, offered the same to Francis Hollins (one of the defendants), who consented to purchase the thirteen bales at 11½*d.* per pound, and who purchased at the same time twenty-five other bales of cotton from H. K. Bayley on the same terms. Messrs. Hollins, under the usual form of order, sampled the cotton on the same day. They had on that morning received a message from Messrs. Micholls, cotton spinners at Stockport (for whom they were in the habit of purchasing cotton), stating that on that day Mr. Micholls would be in Liverpool to purchase cotton through the Messrs. Hollins, and those gentlemen had bought

¹ Law Rep. 7 Q. B. 616.

the cotton from H. K. Bayley believing it to be of the sort which Messrs. Micholls would require. On examining the cotton, Mr. Micholls agreed to take it. Messrs. Hollins were in the habit of thus buying cotton in the belief that their customers would take it. If any particular customer did not take to the cotton thus speculatively purchased for him, Messrs. Hollins disposed of it to some other customer. In the latter part of the 23d of December, Bayley received a delivery order in these terms: "Please deliver the bearer . . . cotton, *ex* Minnesota, at 11½*d.* per lb., bought this day for Micholls & Co., Francis Hollins & Co." The thirteen bales were delivered on the following morning to Messrs. Hollins, by whom they were at once forwarded to Micholls & Co., at Stockport. Bayley received the price of the cotton from Hollins & Co., which was repaid by Micholls & Co., together with a sum for commission and portage, the defendants, Messrs. Hollins, not obtaining a profit on the cotton, but merely receiving a broker's commission on its purchase.

Messrs. Fowler, not having received payment for the cotton at the stipulated time (ten days), applied to Mr. Seddon, and then learnt that he had never employed H. K. Bayley to purchase cotton for him. Application was then made to Messrs. Hollins for the bales of cotton, when the answer given was, "the cotton was bought by one of our spinners, Messrs. Micholls & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your client any assistance." The action for trover was afterwards brought.

The cause was heard before Mr. Justice Willes, at the Liverpool Spring Assizes, 1870, when the facts above stated having been proved, the learned judge left two questions to the jury: first, whether the thirteen bales in question had been bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods as agents for their principals. Both questions were answered in the affirmative, and Mr. Justice Willes then directed the verdict to be entered for the defendants, reserving leave to the plaintiffs to move to enter the verdict for them.

A rule was afterwards obtained for that purpose, and on the 25th of November, 1870, was made absolute. On appeal to the Exchequer Chamber, the judges were equally divided in opinion, and so the judgment of the court below stood affirmed.

This appeal was then brought.

The judges were summoned, and Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Brett, Mr. Baron Cleasby, Mr. Justice Grove, and Mr. Baron Amphlett, attended.¹

The Solicitor-General (Sir John Holker), and Mr. Herschell, Q. C., for the plaintiffs in error, defendants in the action.

¹ MELLOR, J., GROVE, J., and CLEASBY, B., concurred with BLACKBURN, J. AMPHLETT, B., agreed with BRETT, J. Their opinions are omitted, as well as the arguments of counsel. — ED

Mr. Joseph Kay, Q. C., and *Mr. Bigham* (*Mr. C. Russell*, Q. C., with them) for the defendants in error, plaintiffs in the action.

THE LORD CHANCELLOR proposed the following question to the judges:—

Whether, under the circumstances stated in the joint case on appeal, the respondents (the plaintiffs in the action) were entitled to have a verdict entered for them for the value of the thirteen bales of cotton mentioned in the declaration.

BLACKBURN, J. My Lords, it appears from the statement in the case that Fowlers, the plaintiffs, had delivered into the actual custody of Bayley, a broker, thirteen bales of cotton, their property, they believing that they had sold these bales to Seddon, through Bayley, as Seddon's broker, after they had refused to trust Bayley himself; and believing that Bayley was the agent of Seddon to receive delivery; so that Fowlers thought that they were transferring the property to Seddon, but were mistaken, as in fact Bayley had no authority from Seddon either to purchase or to take delivery.

Under such circumstances the property and legal right to the possession remained in Fowlers, and Bayley could not (except by a sale in market overt) confer on any one, however innocent, a title superior to his own. He could not do it under the Factors Acts, because he was not intrusted by the plaintiffs as their agents; nor could he do it as being a person in whom the property had vested, subject to being divested by the plaintiffs, for no property, even defeasible, ever passed from the plaintiffs, as there never was any contract with any one, though they erroneously thought there was one with Seddon.

These points were decided, as I think rightly, in the case of *Hardman v. Booth*.¹

From the terms of reservation (set out in the note to the report of the present case²), it appears that the defendant had an opportunity to have that case reviewed in a Court of Appeal, if so advised, for it is said that, "The defendants be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a *bona fide* purchaser for value without notice." The Court of Queen's Bench, being bound by the decision of a court of co-ordinate jurisdiction, could not so hold; and the defendants have not raised the point for a Court of Appeal.

I proceed to state the farther facts.

Hollins, the defendants, as brokers, acting for Messrs. Micholls, and Messrs. Micholls, as customers, acting through the defendants as brokers, dealt with Bayley in a manner which would have been quite right, if Bayley had been an honest man, or, even a dishonest man, if intrusted by the plaintiffs with the possession of the goods, as an agent, for sale.

And the defendants and Micholls were both innocent of any knowl-

¹ 1 H. & C. 803.

² Law Rep. 7 Q. B. 620.

edge of any infirmity in Bayley's title, and not only were they innocent, but I think there is nothing amounting even to evidence of negligence on the part of the defendants in dealing with Bayley without farther inquiry, nor, *a fortiori*, in Micholls who trusted the defendants to act for him, and dealt with Bayley because the defendants selected him.

Under those circumstances, your Lordships ask the question, whether the plaintiffs were entitled to have a verdict entered for them for the value of the thirteen bales of cotton.

And I answer that question in the affirmative. However hard it may be on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet, as long as the law, as laid down in *Hardman v. Booth*,¹ is unimpeached, I think it is clear law, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person must pay the value of the goods to the real owners, the plaintiffs. See *Stephens v. Elwall* and *Garland v. Carlisle*.²

And, accordingly, I think it has not been disputed by any one, that if the plaintiffs had sued Micholls, who has worked this cotton up into yarn, Micholls must have had judgment against him for the value of the cotton, and would be liable to pay the price over again, though he honestly transmitted the price to the defendants, Hollins, who honestly handed it to Bayley.

And I take it that if the defendants have done what amounts in law to a conversion, they also must be liable to pay the plaintiffs.

It is hard on them, I agree, but I do not think it is harder than it would have been on Micholls. Indeed, I think, that if the plaintiffs were told that they had recourse, at their option, against either the broker or the spinner, they might, without any obvious injustice, have said: Then make the broker pay, for he went to Bayley's, so that if there is any fault it is his.

But we cannot act on any notions of hardship.

When a loss has happened through the roguery of an insolvent, it must always fall on some innocent party; and that must be a hardship. Had the Legislature thought fit to make a sale in the cotton-market at Liverpool equivalent to a sale in market overt, the loss would have fallen on the plaintiffs. As it is, it falls on any one who has done what the law esteems a conversion.

We must, I apprehend, in such cases look only to the question, whether on the established principles of law the complaining party makes out that the loss should fall on the innocent defendant rather than on himself, the equally innocent plaintiff.

If, as is quite possible, the changes in the course of business since the principles of law were established make them cause great hardships or inconvenience, it is the province of the Legislature to alter the law. That has been done to a considerable extent by the Factors Acts, and it

¹ 1 H. & C. 803.

² 4 Cl. & F. 693.

may be expedient to extend that alteration farther, but those Acts have not as yet been extended so far as to embrace the case of any one, whether as broker or otherwise, dealing with a person in the position of Bayley in this case. And I apprehend your Lordships will not, in your judicial capacity, depart from the established principles of law to meet the hardship of a particular case, even if you were so convinced of that hardship as to be willing in your legislative capacity to concur in a change of the law in future. But this leaves open what I take it is the real question in this case, viz., whether what the defendants did amounts on the established principles of law to a conversion.

I own that it is not always easy to say what does and what does not amount to a conversion. I agree with what is said by my Brother Brett in his judgment below, that in all cases where we have to apply legal principles to facts, there are found many cases about which there can be no doubt, some being clear for the plaintiff, and some clear for the defendant, and that the difficulties arise in doubtful cases on the border line between the two.

I think many cases which at first seem difficult are solved if the nature of the action is remembered.

Lord Mansfield says, in *Cooper v. Chitty*:¹ "The bare defining of this kind of action and the grounds upon which a plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case. In form it is a fiction, in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use. The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases where in truth the defendant has got the possession lawfully. When the defendant takes them wrongfully, and by trespass, the plaintiff, if he thinks fit to bring this action, waives the trespass, and admits the possession to have been lawfully gotten."

It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification.

From the nature of the action, as explained by Lord Mansfield, it follows that it must be an interference with the property which would not, as against the true owner, be justified, or at least excused, in one who came lawfully into the possession of the goods.

And in considering whether the act is excused against the true owner it often becomes important to know whether the person, doing what is charged as a conversion, had notice of the plaintiff's title.

There are some acts which from their nature are necessarily a conversion, whether there was notice of the plaintiff's title or not. There are others which if done in a *bona fide* ignorance of the plaintiff's title are excused, though if done in disregard of a title of which there was

¹ 1 Burr. 20; 1 Sm. L. C. 417.

notice they would be a conversion. And this, I think, is borne out by the decided cases. Thus a demand and refusal is always evidence of a conversion. If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or a third person, it is a conversion. If the refusal is by a person who does not know the plaintiff's title, and having a *bona fide* doubt as to the title to the goods, detains them for a reasonable time, for clearing up that doubt, it is not a conversion; see *Isaac v. Clarke*,¹ *Vaughan v. Watt*. The principle being, as I apprehend, that the detention, which is an interference with the dominion of the true owner, is, under such circumstances excused, if not justified.

So the finder of goods is justified in taking steps for their protection and safe custody till he finds the true owner. And therefore it is no conversion if he *bona fide* removes them to a place of security. And so far the general statement that an asportation is a conversion must be qualified.

I cannot find it anywhere distinctly laid down, but I submit to your Lordships that on principle, one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner, or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods, or intrusted with their custody.

I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties.

Thus a warehouseman with whom goods have been deposited is guilty of no conversion by keeping them, or restoring them to the person who deposited them with him, though that person turns out to have had no authority from the true owner; see *Heald v. Carey*,² *Alexander v. Southey*.

And the same principle would apply to the cases alluded to by my Brother Hannen in his judgment in the court below, of persons "acting in a subsidiary character, like that of a person who has the goods of a person employing him to carry them, or a care-taker, such as a wharfinger." It will enable us also to answer a question put during the argument at your Lordships' bar. It was said: "Suppose that the defendant had sent the delivery order to Micholls, who had handed it to the railway company, requesting them by means of it to procure the goods in Liverpool and carry them to Stockport, and the railway company had done so, would the railway company have been guilty of a conversion?"

I apprehend the company would not, for merely to transfer the custody of goods from a warehouse at Liverpool to one at Stockport, is *prima facie*

¹ 1 Buls. 306, see p. 312.

² 11 C. B. 977.

an act justifiable in any one who has the lawful custody of the goods as a finder, or bailee, and the railway company, in the case supposed, would be in complete ignorance that more was done. But if the railway company, in the case supposed, could have been fixed with knowledge that more was done than merely changing the custody, and knew that the company's servants were transferring the property from one who had it in fact to another who was going to use it up, the question would be nearly the same as that in the present case. It would, however, be very difficult, if not impossible, to fix a railway company with such knowledge.

And on the same principle I take it the ruling of Lord Tenterden in *Greenway v. Fisher* may be supported; for the packer was merely giving facilities for the transport of the goods from one place to another, and was ignorant of the circumstances which made it wrong against the true owner to remove the goods, though I admit that his decision is not put by Lord Tenterden on this ground, but on that of the packer's being a public employment, which I think my Brother Brett, in his judgment below, correctly shows to be a mistaken ground; I think the public nature of his employment was strong evidence that he was doing no more than assist in the change of custody, which was, on the principle suggested, excused in one ignorant of all that made the change of custody wrongful, but I do not see how in itself it made any difference. A packer is not, like a carrier or inn-keeper, bound to receive all goods brought to him.

I think, however, it is but candid to admit that the principle I have submitted to your Lordships, though it will solve a great many difficulties, will not solve all.

In Comyns' Digest¹ it is said, "If a man deliver the oats of another to B. to be made oatmeal, and the owner afterwards prohibits him, yet B. makes the oatmeal, this is a conversion." *Per* Berkly, 1638.

To this every one would agree; but suppose the miller had honestly ground the oats and delivered the meal to the person who brought the oats to him before he even heard of the true owner. How would the law be then? Or, suppose the plaintiffs in the case at your Lordships' bar had, for some reason, brought the action against Micholls' men who assisted in turning this cotton into twist? The principle I have suggested would hardly excuse such conversions; and yet I feel that it would be hard on them to hold them liable. If ever such a question comes before me, I will endeavor to answer it. I think it is not necessary now to do so; for I think that what the defendants are found to have done in the present case amounts to a conversion, and is not in any way excused.

I do not rely on the ground, taken in the earlier part of my Brother Cleasby's judgment below, that the defendants themselves were the purchasers from Bayley, for though, if it were left to me to draw infer-

¹ Action on the Case — *Trover*, E.

ences of fact, I should draw that inference, I doubt if it is open to me so to do after the finding of the jury affirming that the defendants were agents. But though it is to be taken in favor of the defendants that they acted throughout as brokers, and only as brokers, for Micholls, I still think them guilty of a conversion.

The case against them does not rest on their having merely entered into a contract with Bayley, or merely having assisted in changing the custody of the goods, but on their having done both. They knowingly and intentionally assisted in transferring the dominion and property in the goods to Micholls, that Micholls might dispose of them as their own, and the plaintiffs never got them back. It is true they did it as brokers for Micholls, and not for any benefit for themselves; but that is not material; see *Parker v. Godin*. There, "the jury (considering the defendant acted only as a friend, and that it would be hard to punish him) found a verdict for the defendant. But upon application to the court, a new trial was granted, upon the fact of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use."

No doubt in that case the friend, it may be inferred, knew of the bankruptcy, and was therefore not an innocent party. But that remark will not apply to *Stephens v. Elwall*, where Lord Ellenborough says: "The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master, but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it." No case harder than that of the defendant in *Stephens v. Elwall* can well be imagined, unless, perhaps, that of a sheriff who seized the goods which, in consequence of a secret act of bankruptcy, had become the goods of the assignees. He was liable to them in trover; see *Garland v. Carlisle*.¹ The Legislature altered the law to avoid that hardship, making the loss in future fall on the assignees; and the Legislature may, to avoid the hardship on persons situated like the defendants, extend the protection now given to purchasers in market overt, and to persons dealing with agents intrusted under the Factors Acts, to brokers dealing with any one in the ordinary markets. Those who agree with the opinion expressed by the Lord Chief Baron² that it is unreasonable and unjust that they should be bound, at their peril, to inquire into the title of the sellers with whom they deal, would support an alteration of the law to that effect. Many, having regard to the interest of the true owners of goods, would object to it. But I think that the law, as it exists, does not protect such brokers.

The conversion in the case of *Stephens v. Elwall* consisted in assisting in transferring the goods from Deane to the defendant's master in America, with intent to transfer Deane's *de facto* property to the defend-

¹ 4 Cl. & F. 693.

² Law Rep. 7 Q. B. 641.

ant's master. Deane's title was bad against the plaintiffs, who were assignees of Spencer, because he had bought them from Spencer after an act of bankruptcy, though of that the defendant was ignorant, unavoidably ignorant, says Lord Ellenborough.

The conversion in the present case consists in, by means of the delivery order, transferring the goods from Bayley to Micholls with intent to transfer *de facto* Bayley's property to Micholls. Bayley's title was bad against the now plaintiffs, though of that the defendants were ignorant. I can see no possible distinction between the two cases. No doubt *Stephens v. Elwall* may be overruled in this House, but I do not think it wrong, and no decision cited, or of which I am aware, seems to me in conflict with it. *Ross v. Johnson*, cited by my Brother Brett, is not in point. There the defendant had received goods as plaintiff's warehousemen. They were lost, and the ruling of the court was, that though an action might lie for negligence, if there was any, there was no conversion.

The *Lancashire Wagon Company v. Fitzhugh*¹ was an action for the injury to the reversionary interest of the plaintiffs in certain goods let to one Pell for a term. The sheriff had seized and sold those goods under an execution against Pell. He had a right to sell Pell's limited interest, but none to sell the plaintiff's interest, and the question raised, or at least intended to be raised, on the record was, whether the sheriff had done anything injurious to plaintiffs' interest. I have failed to see how the decision bears upon the point now in dispute, except in so far as the decision, that though a sale is no conversion, a sale and delivery to one who uses the goods is, makes against the defendants.

I need hardly say, that where there has been so great a difference of judicial opinion, I express my opinion with diffidence; but the reasons I have given lead me to form the opinion I have expressed, and I therefore answer your Lordships' question in the affirmative.

BRETT, J. In the judgment which in this case I delivered in the Exchequer Chamber, I endeavored to fix exactly the question which had to be determined. I did so because I thought, with deference, that it had been overlooked in the judgments given in the Court of Queen's Bench. I venture again to draw attention particularly to the same point, because I think it has been disregarded by some of the judges in the Exchequer Chamber. In the Queen's Bench, Mellor, J., says: "It is needless to consider now, whether if the defendant Hollins had expressly purchased these goods for Micholls, Lucas, & Co., he would have had a good defence to this action, because that point did not, in fact, arise. It would seem that these goods were bought on speculation, &c. Then, the defendant, being alone responsible to the seller, deals with the goods by selling them to a third party." Lush, J., says: "It is quite unnecessary to consider what the defendant's liability would have been if he had bought for a principal, because it is clear that he

¹ 6 H. & N. 502.

bought on his own account and then sold the goods." Hannen, J., says: "This is not the case of a mere broker dealing with the goods in that character. For if Bayley had had the title in him to sell this commodity, the actual property in the goods would have been in the defendants." Each of the judges bases his decision on an interpretation of the evidence by which he concludes that Hollins bought as a principal from Bayley, and sold as a principal to Micholls & Co.

Martin, B., in the Exchequer Chamber, interprets the finding of the jury to mean "that cotton-brokers deal with cotton in the same manner as the defendants dealt with this cotton. For no man, he says, can doubt but that the defendants bought the goods as principals from Bayley; secondly, that they dealt with them only as agents to their principal. This finding is in my judgment immaterial; whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence." In another part, he says: "In one sense the finding was correct; I have no doubt the defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts show a sale by Bayley to the defendants, and a re-sale by them to Micholls & Co." This judgment either relies upon that last interpretation of the facts, or upon a proposition of law, that every agent who deals with another person's property, in the sense of having it in his possession for any other purpose than holding it for the true owner, is, by the mere fact of so doing, liable to the true owner in trover. Cleasby, B., founds his judgment on this: "It was therefore in this right, as the persons entitled to the possession of the cotton as buyers from Bayley, that the defendants obtained possession of it for the purpose of transferring the property in it to their principals, Micholls & Co., and this dealing with the property appears to be a clear conversion upon all the authorities. The defendants acted as brokers, but from the circumstances attending the contract they became themselves interested in it." This judgment seems to be founded on the view that the defendants became principals in the purchase of the cotton so as to buy as principals from Bayley and sell as principals to Micholls & Co. It is because all these judgments are founded upon the same interpretation of the evidence, and of the findings of the jury, that I venture, as I have said, to call particular attention to the direction of Willes, J., to the findings of the jury, and to the form of the leave reserved. They can be best understood by considering the course of business with which the judge and jury were dealing. What is that course of business?

Liverpool is the cotton mart for Lancashire and Yorkshire. A Liverpool cotton broker instructed to purchase makes contracts in Liverpool for the purchase of cotton by his clients in the country districts. He informs his country client of the completion of the contract by a bought note forwarded to him in the country. The cotton is at the time of the contract usually warehoused in Liverpool. If the cotton has been bought by sample, or according to one of the Liverpool known enumerations of kind or quality, the country client may desire to exercise an

opinion on the cotton purchased for him. If so, he requests the broker to obtain for him a bulk sample, which the broker does, and forwards it. Again, the country client does not require immediate delivery from the Liverpool warehouse; but when later he does, he requests his broker to forward the cotton. The broker then obtains or signs a delivery order, and by a carter receives delivery from the warehouse, and forwards the cotton to a Liverpool railway station. This is done generally after the broker has had many transactions in cotton passing through his hands for other clients. It is an addition to the more regular business of brokers, which Liverpool cotton brokers have undertaken. It was in order to test the legal effect of this new course of business, and the liability of the brokers who carry it on, in the case of the immediate seller, through them of the cotton, being fraudulent or unauthorized to sell the cotton, but such defect being unknown to the broker, that Willes, J., left two questions to a Liverpool special jury, first, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principals. When a question in the form of either of these is put to a jury, there is, of course, always the antithetical proposition, perfectly well understood by the jury, and the facts material to which are discussed by the judge in summing up the evidence. The real expansion, then, of the questions, as applied to the course of business and its effect, was, first, did the defendants make the contract as agents for principals, *i. e.*, acting merely as brokers to make a contract, or did they buy from one and sell to the other; and, secondly, did the defendants take and make delivery with reference to a contract between two parties, that is to say, with a view to bind the contract to specific goods, or to pass the property in goods from one party to the other, or were they simply acting as agents of a person to whom goods were assumed already to belong, to forward his own goods to him. The alternative propositions must have been just as much before the jury as the primary ones, expressly reported to the court by the judge. That this was the meaning intended by the judge and understood by the jury seems to me plain from the terms of the leave reserved, which are that the verdict may be entered for the plaintiffs, if the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton as having converted them to their own use. I venture to say and to press upon your Lordships that, upon such a reserved leave, which cannot be reserved without the consent of both parties to the suit to its terms, neither the Court of Queen's Bench, nor the judges in the Exchequer Chamber, had any right to put upon the questions, answer, or evidence, any other interpretation than that which is put by the leave reserved, and I venture to repeat that, otherwise, parties will not consent that leave should be reserved. Yet every one

of the judgments to which I have referred otherwise interprets both the questions and the evidence, and resolves that the evidence proved precisely the propositions which the jury negatived, and is inconsistent with the propositions which the jury affirmed. And far from agreeing with the learned judges who thus pronounce the verdict to be contrary to the evidence, I humbly agree with Willes, J., who was satisfied with the verdict, that in truth and in fact the verdict was right, that the defendants did make the contract for principals, and that in forwarding the cotton they had no question of property in their mind. If any property in this cotton could have passed, it would have passed by the contract, and not by the subsequent forwarding. It is impossible to my mind to suppose that Willes, J., could have reserved a question of law for the opinion of the court, if the questions left by him, or the evidence, could be interpreted as they have been in those judgments. To hold as the judges have held, is either to hold that the jurors have answered the questions wrongly, or that the questions were immaterial; in one case, that the verdict was against the evidence, in the other that Willes, J., notwithstanding the answers, ought to have directed the verdict to be entered for the plaintiffs, and therefore was guilty of misdirection. Yet the Court of Queen's Bench refused to grant a rule as for misdirection, or as for a verdict against evidence, and confined the discussion to whether the verdict should be entered for the plaintiffs on a count in trover, on the assumption, as I submit, that the interpretations put upon the questions of the judge and the answers of the jury, by the leave, are correct. I submit, therefore, that the very foundation of this case is that the defendants made the contract as agents and brokers only, and that they did not buy or sell as principals, and that in obtaining the sampling order and sample, and in obtaining or signing the delivery order, and in receiving and forwarding the cotton, they acted, so far as knowledge or recollection and intention went, merely as agents for Micholls, Lucas & Co., to examine for them, to receive for them, to forward to them, goods assumed at the time to be their goods without any reference to the contract by which the goods became theirs. The question of law is, whether such dealing with goods can lay a mere agent open to an action of trover. The question in business, and it is a most important one for Liverpool, is, whether the cotton brokers of Liverpool may with safety, so long as they do no more, add to their proper function of brokers the business of forwarding cotton to the Liverpool stations for their clients. If they may, it seems to be an addition to their business of mere brokers innocent as regards others, and convenient for them and their clients. If the brokers may not safely perform this small function of forwarding to the station, another agent must be introduced by the country principal to do it, to the great inconvenience of such principal.

The real question, which I cannot doubt it was the intention of Justice Willes to have discussed, is, whether every actual dealing with a chattel in a manner inconsistent with the right of a true owner gives to

the true owner a right of action in trover against every person so dealing, except a common carrier, or whether the dealing with the chattel, in order to support against him who has dealt with it an action of trover, must not be with intention to interfere with the property in the chattel. I believe that he desired to have set at rest the divergence of opinion on this point between Baron Martin and the other barons in the case of *Burroughes v. Bayne*. In that case Baron Martin says: "But the word 'conversion,' by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." Farther on he explains what he intends by this. He quotes from the judgment of Alderson, B., in *Fouldes v. Willoughby*, thus: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or another, it is a conversion." "I," says Martin, B., "entirely accede to this view of the law, which is simple and of easy application." It is obvious that Martin, B., took a very large view of the term "conversion." And that the question of the right interpretation of the term is very important, for upon it may depend whether a defendant is to be held liable in trover for the full value of the chattel in dispute or in trespass for perhaps only nominal damages. In the same case of *Burroughes v. Bayne*, Channell, B., says: "I desire it to be understood that I do not mean to state, or suggest, that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion, and therefore it seems to me that every detention cannot be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favor of the party himself, or any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third person amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel at all times and places over that chattel is a conversion. On the other hand the simple asportation of a chattel, without any intention of having farther use of it, though it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion." Bramwell, B., says: "It certainly is not every detention of goods, although there is no right to detain them, that is a conversion, in my judgment at all events." Again: "The result is, you must in all cases look to see not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use." Again: "If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing. Instead of which, by the use of the word 'conversion,' the defendant is made liable for the value of the

billiard table, which he cannot recover from any one else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff," &c. In the judgment in the Exchequer Chamber, Martin, B., repeated the same view of a conversion which he had stated in *Burroughes v. Bayne*: "But as regards the action of trover," he says, "I think it is well settled that the assumption and exercise of dominion — and asportation is an exercise of dominion — over a chattel, inconsistent with the title and general dominion which the true owner has in and over it, is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person." Now the greater part of the propositions thus enunciated by Martin, B., are identical with the propositions of the other judges. All, I think, agree that the assumption and exercise of dominion over a chattel, inconsistent with the title of the true owner, is a conversion. All would agree that the detaining goods so as to deprive the person entitled to the possession of them of his dominion over them is a conversion, if by the word "dominion" in the last proposition is intended "title as owner." The essential difference between the view of Baron Martin and the other judges I have mentioned is in the sense in which this word "dominion" is used by him and them. When Baron Martin speaks of interfering with the dominion of the true owner, he means interfering with the mere possession or right of possession of the owner. The other judges mean an interference or dealing with, or doing some act in negation of, the title as owner, of the true owner. Baron Martin holds that every asportation or detention which cannot be justified, *i. e.*, which is not done for the true owner, is a conversion. Baron Channell and Baron Bramwell hold that a mere simple asportation or detention is not of itself a conversion, but only when either is done in a manner or with an intention inconsistent with the proprietary title, as owner, of the true owner. If the findings of the jury in the present case are to be treated as I have suggested they should be treated, then the question in this case is, what is the proper definition of the term "conversion" in a case in which an asportation of the chattel is relied on as the conversion. If the first finding is to be treated as a binding decision that the defendants in making the contract acted only as brokers, so that they did not themselves buy the cotton as buyers, and so that they did not sell it as sellers, then what they thus did is clearly, I think, no conversion. The reasons for this I gave in my judgment below. If the second finding is treated as a decision that the asportation was a mere simple asportation, made without intention of or relation to interference with any one's title, then such asportation is no conversion unless the definition of Martin, B., is preferred to that of Barons Bramwell and Channell. It cannot fail to be observed that the definition of Martin, B., includes the cases of a carrier, wharfinger, warehouseman, and packer, even when there is no demand and refusal; and that in order to meet the difficulty,

he, in his judgment in the Exchequer Chamber, declares that the case of a carrier is to be excepted, because he is bound by law to receive and carry the goods of every one who brings goods to him; and that the case of a packer is not properly an exception, and that the case of *Greenway v. Fisher* is wrongly decided. I endeavored in the Exchequer Chamber to explain all the cases which are called exceptional, by showing that the definition of a conversion laid down by Bramwell and Channell, BB., is the correct definition, and that if so, the cases referred to are properly decided, not because they are exceptions to, but because they are outside the rule. I cannot assist much farther upon this point than I endeavored to do in that judgment, to which I beg to refer. In addition, however, I may say that in *Simmons v. Lillystone*, Parke, B., says: "Here the defendant never intended to take to himself any property in the timber," and, "We are all of opinion that there was no sufficient evidence of a conversion. In order to constitute a conversion there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it." If the last phrase be expanded, it clearly means "or to deprive the plaintiff of the property in the goods." In *Chitty on Pleading*¹ it is said: "There may be a conversion, 1st, by wrongfully taking a personal chattel; 2dly, by some other illegal assumption of ownership, or by illegally using or misusing goods; or 3dly, by a wrongful detention." Looking to the phraseology of the second branch, which speaks of "some other assumption of ownership," it is obvious that the taking in the first branch is a taking as in right of ownership in the defendant, or in some one other than the plaintiff. In explaining the second branch, the learned author says: "So the wrongful assumption of the property in goods may be a conversion of itself, or the wrongful assumption of a right of disposing of them." And under the latter, he gives as instances a wrongful user of the goods, i. e., I apprehend, a user as if the defendant or some one other than the plaintiff were the owner, and a misuser by the defendant, as by breaking bulk, or consuming, or transforming, which are all cases of the exercise of acts as of ownership. It seems apparent to me that a claim or exercise of ownership is throughout in the mind of the author as the reason of his producing the cases as examples of "actual conversion." And then he proceeds to the third head, and says: "A demand and refusal are necessary in all cases where the defendant became in the first instance lawfully possessed of the goods, and the plaintiff is not prepared to prove some distinct 'actual conversion.'" That is to say, as it seems to me, that in order to prove a conversion, you must give evidence either of "an actual conversion," which consists in the defendant taking or using the goods with the intent to exercise an act of ownership on his own behalf, or of some one other than the plaintiff, or of a conversion by reason of a refusal on demand. I conclude, therefore, as before, that the defendant cannot be properly made liable in

¹ Vol. i. tit. *Trover*, p. 172, Ed. 1844.

trover on the first part of the leave reserved in this case, because he was acting only as a broker, to make a contract between other parties, and none with himself; nor on the second part of the leave reserved, because the court was bound to treat the asportation, which was relied on as an actual conversion, as a simple asportation made without intent to interfere in any manner with the title of or ownership in the cotton. I cannot agree with the view which seems to me to be expressed by Martin, B., in *Burroughes v. Bayne*, that the action of trover is equivalent to an action of trespass, and was invented in order to replace the action of detinue, avoiding only the right of the defendant to wage his law. I believe that it was invented in order to provide a remedy in damages, where there has been a trespass, and more than trespass to goods, namely, acts done with the intention of transferring or interfering with the title to or ownership of them, or which are done as acts of ownership of them, or where without an original trespass there have been acts done with the intention of transferring or interfering with the title to or ownership of them, or which have been done as acts of ownership of them. I am still of opinion that a possession or detention which is a mere custody or mere asportation made without reference to the question of the property in chattels is not a conversion. I answer your Lordships' question by saying that in my opinion the judgments in the Court of Queen's Bench and Exchequer Chamber ought to be reversed, and that judgment in the action ought to be entered for the defendants.

LORD CHELMSFORD.¹ My Lords, . . . I think that the judgments of the Court of Queen's Bench and of the Exchequer Chamber are right, and ought to be affirmed.

*Judgment of the Court of Exchequer Chamber affirmed.*²

WILLIAMS AND CHAPIN v. MERLE.

SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1833.

[Reported in 11 *Wendell*, 80.]

THIS was an action of trover, tried at the New York Circuit in October, 1831, before the Hon. Ogden Edwards, one of the circuit judges.

About the first of November, 1829, the master of a tow-boat took by mistake four barrels of potashes from the warehouse of the plaintiffs, who, and the owners of the tow-boat, occupied the same building in Albany. The master, on his arrival in New York, having discovered the mistake, delivered the articles to a clerk of the agents of his prin-

¹ THE LORD CHANCELLOR (LORD CAIRNS), LORD HATHERLEY, and LORD O'HAGAN concurred with LORD CHELMSFORD. The opinions of the four Lords are omitted. — ED.

² See *City Bank v. Babcock*, 1 *Holmes C. C.*, 180, 184. — ED.

cipals, who said he would take the ashes to an inspector's office and advertise them. The clerk accordingly took them to an inspector's office on the 3d of November, obtained a certificate of inspection, and on the 6th of November sold the ashes to the defendant, a produce broker, who purchased them for a Mr. Paterson for a fair price, and received the inspector's certificate. On the 10th of November the defendant took the ashes from the inspector's office, and shipped them to the order of his principal. About the 1st of September, 1830, the plaintiffs demanded the ashes of the defendant, who refused to account for them, saying he had purchased and paid for them a year preceding the demand. The judge intimated his opinion that if the defendant had acquired the ashes *bona fide* by purchase in the regular course of his business as a broker, and had disposed of them *bona fide*, pursuant to the instructions of his principal before suit brought, that the action would not lie; he, however, refused to nonsuit the plaintiffs, and the jury, under his direction, found a verdict for the plaintiffs for the value of the ashes and the interest thereof, reserving the question as to the plaintiffs' right to recover, for the opinion of this court.

S. Stevens, for the plaintiffs. *C. Graham*, for the defendant.

By the Court, SAVAGE, C. J. The question is, whether the plaintiffs are entitled to recover upon the facts of this case. That they had title to the property does not admit of dispute. Has that title been transferred to the defendant, and in what manner? The owner of property cannot be divested of it but by his own consent, or by operation of law. Morgan, who took the property by mistake, certainly acquired no title. Shankland (the clerk) surely had no title. If the defendant has title, it comes to him from a person who had none. In the language of Mr. Justice Sutherland, in *Everett v. Coffin*,¹ "the disposing or assuming to dispose of another man's goods, without his authority, is the gist of this action; and it is no answer for the defendants that they acted under instructions from another, who had himself no authority." This same principle was asserted by this court in *Prescott v. Deforest*,² where it was held that a landlord who distrained and sold the goods of his tenant conveyed no title to the purchaser, the distress being unauthorized. The court said, that if Satterlee (the landlord) had no right to distrain and sell the goods, it necessarily follows that the defendant, though a *bona fide* purchaser for valuable consideration, acquired no title. So far, then, as the defendant's title depends upon the purchase by him in good faith, and for valuable consideration, it is still without foundation so long as the seller had neither title nor authority to sell. The owners were not in fault; the property was taken without their consent or knowledge. The maxim *caveat emptor* applies; the purchaser must look to the seller for indemnity.³

The defendant stands in no better situation than any other who purchases an article from a party without title or authority to dispose

¹ 6 Wend. 609.

² 16 Johns. 159.

³ A part of the case, not relating to conversion, is omitted. — ED.

of such article; in such case the purchaser acquires no title. The true owner has a right to reclaim his property and to hold any one responsible who has assumed the right to dispose of it.

The plaintiffs are therefore entitled to judgment upon the verdict.¹

CONSOLIDATED COMPANY *v.* CURTIS AND SON.

IN THE QUEEN'S BENCH DIVISION, MARCH 1, 1892.

[Reported in (1892) 1 *Queen's Bench*, 495.]

COLLINS, J., read the following judgment:² This is an action of trover by the grantees under a bill of sale of household furniture and effects against auctioneers who sold the same by order of the grantor, in ignorance of the existence of the bill of sale. Messrs. Curtis & Son, the defendants, received instructions in the ordinary course of business from the grantors to sell the goods in question by auction on the premises, No. 13, Seamoor Road, Westbourne, then in the occupation of the grantor, and which were not the premises where the goods were at the time of the bill of sale. Messrs. Curtis & Son prepared and circulated a catalogue which included not only the goods comprised in the bill of sale, but others belonging to other persons. The sale took place on June 18, 1891, and the goods in question were delivered to purchasers, as was admitted, in the ordinary course. "Ordinary course" was described by a witness called for the defendants — the only one called in the case — all other material facts being admitted between the parties. He was a valuer in the employ of the plaintiffs, and stated that he was very familiar with the course of business at auctions both at public sale-rooms and at private residences, having been obliged to attend at very many of them in his capacity as valuer, and also as having been formerly himself a clerk to an auctioneer, and having himself been charged with the duty of carrying out the delivery to purchasers. I admitted his evidence, subject to an objection from Mr. Foote that he was not competent. His evidence was that it was the duty and practice of the auctioneer in all cases to carry out the delivery, whether the sale takes place at a sale-room or at a private residence; he receives the deposit and the purchase-money, and on receipt gives orders to porters employed by him to assist in or effect the delivery. No delivery can be had without his receipt.

On these facts it was submitted on behalf of the plaintiff that a conversion by the defendants had been proved. On the other hand, Mr.

¹ 4 *Lee v. Mathews*, 10 Ala. 682; *Hudmon v. Dubose*, 85 Ala. 446, 447; *Rice v. Yocum*, 155 Pa. 538 *Accord*.

But see *Hunt v. Kane*, 40 Barb. 636. — Ed.

² Only the opinion of the court is given. — Ed.

Foote contended, chiefly on the authority of *Turner v. Hockey*,¹ that what his clients had done did not amount to a conversion. No alternative ground of claim was suggested, and the damages, if any, were agreed at £29 10s. In view of that case, which certainly at first sight seems to go the whole length of the defendants' position, I took time to look more fully into the authorities.

No doubt there is considerable difficulty in framing an exact and exhaustive definition of a conversion, and it is not easy to draw the line at the precise point where a dealing with goods by an intermediary becomes a conversion. The difficulty is diminished by remembering that in trover the original possession was by a fiction deemed to be lawful (*per* Martin, B., in *Burroughes v. Bayne*, and *per* Lord Mansfield, C. J., in *Cooper v. Chitty*²), and some act had therefore to be shown constituting a conversion by the defendant of the chattel to his own use, some act incompatible with a recognition on his part of the continuous right of the true owner to the dominion over it. All acts, therefore, as suggested by Blackburn, J., in his opinion given to the House of Lords in *Hollins v. Fowler*, which are consistent with the duty of a mere finder such as the safe guarding by warehousing or asportation for the like purpose, may well be looked upon as entirely compatible with the right of the true owner, and, therefore, as not constituting a conversion by the defendant. It may be, as suggested by Brett, J., in the same case, that the test is whether there is an intent to interfere in any manner with the title of or ownership in the chattel, not merely with the possession. The difficulty is, I think, rather in drawing the true inference from facts in particular cases than in grasping the principle. There are, however, happily many cases which fall clearly on one side or other of the line. It is clear that there can be no conversion by a mere bargain and sale without a transfer of possession. The act, unless in market overt, is merely void, and does not change the property or the possession: *Lancashire Wagon Co. v. Fitzhugh*,³ and *per* Brett, J., in *Fowler v. Hollins*. *A fortiori*, mere intervention as broker or intermediary in a sale by others is not a conversion. This is the case put by Bramwell, L. J., in *Cochrane v. Rymill*⁴ of an introduction by an auctioneer of a purchaser to a vendor. But, unless *Turner v. Hockey* decided the contrary, I should have thought it equally clear that a sale and delivery with intent to pass the property in chattels by a person who is not the true owner and has not got his authority is a conversion.

What, then, is the position of an auctioneer who sells and delivers in ordinary course? Is he a mere broker who negotiates a sale between two other persons, and then, as suggested by Brett, J., was the case in *Fowler v. Hollins*, acts only as forwarding agent "without any actual intention with regard to, or any consideration of, the property

¹ 56 L. J. Q. B. 301.

² 6 H. & N. 502.

³ 1 Barr., at p. 31.

⁴ 40 L. T. N. S. 744.

in the goods being in one person more than another," a mere conduit-pipe, as it has been called? In my opinion, an auctioneer who sells and delivers in ordinary course is more than a mere broker or intermediary.

"An auctioneer," says Lord Loughborough in *Williams v. Millington*,¹ "has a possession coupled with an interest in goods he is employed to sell, not a bare custody like a servant or shopman. There is no difference whether the sale be on the premises of the owner or in a public auction-room; for on the premises of the owner an actual possession is given to the auctioneer and his servants by the owner, not merely an authority to sell. I have said a possession coupled with an interest; but an auctioneer has also a special property in him with a lien for the charges of the sale, the commission, and the auction duty which he is bound to pay. In the common course of auctions there is no delivery without actual payment; if it be otherwise the auctioneer gives credit to the vendee entirely at his own risk. Though he is like a factor, therefore, in some instances, in others the case is stronger with him than with a factor, since the law imposes the payment of a duty on him, and the credit in case of a delivery, without the recompence of a commission *del credere*." In *Fowler v. Hollins*, Brett, J., in speaking of the new assignment in *Lancashire Wagon Co. v. Fitzhugh*,² which was held to show a conversion, says: "If it rested only on a delivery as I think it might, it is because the delivery under a sale by a sheriff or an auctioneer is a delivery with intent to pass the property, and so more than a simple asportation and delivery." In the same case in the House of Lords, Cleasby, B., at p. 787, says: "How far the intermeddling with the goods themselves by delivering them would do so," i. e., involve responsibility, "admits of question, and was the subject of much argument at the bar, and might depend upon the extent to which the broker in each case could be regarded as having an independent possession of the goods and delivering for the purpose of passing the property. For example, an auctioneer delivers possession for the purpose of passing the property, and it would not be disputed that he would be liable as upon a conversion to the real owner."

These authorities would seem to dispose of one of Mr. Foote's main arguments, that the auctioneer never had possession, and acted throughout as a mere intermediary between his employer and the purchasers. In this respect he contended that he stood in a better position than the defendant in *Turner v. Hockey*,³ who, he pointed out, undoubtedly had possession of the cow which was the subject of the action, and he relied on that case as directly in point. In order to see exactly what that case did decide, it is, I think, necessary to examine the two cases turning on somewhat similar facts which preceded it, viz.: *Cochrane v. Rymill*,⁴ and *National Mercantile Bank v. Rymill*.⁵

¹ 1 H. Bl., at p. 84.

² 56 L. J. Q. B. 301.

⁴ 44 L. T. N. S. 767.

³ 6 H. & N. 502.

⁴ 40 L. T. N. S. 744.

In *Cochrane v. Rymill*,¹ the defendant, an auctioneer, had received at his repository certain horses and cabs from one Peggs, with instructions to sell them by auction. The defendant made him an advance on the goods, and afterwards sold them. The goods, in fact, belonged to the plaintiff, to whom Peggs had given a bill of sale; but of this the defendant knew nothing. It was held by the Court of Appeal, affirming Lord Coleridge, C. J., that the defendant was liable for conversion. Bramwell L. J., however, put the following case as one clearly not constituting a conversion. "What," said he, "if a man were to come into an auctioneer's yard holding a horse by the bridle, and saying, 'I want to sell this horse; will you find me a purchaser?' Then, if the auctioneer says to the bystanders, 'There is a man who wants to sell a horse; will any one buy him?' and some one bought the horse, then there would be no act of conversion on the part of the auctioneer; he would be merely a conduit-pipe; but in this case there is clearly a dealing with the property by the defendant as if he were a person who had the right to dispose of the property."²

The next case, *National Mercantile Bank v. Rymill*,³ was an action of conversion against the same defendant. One, Seaman, had given a bill of sale of certain horses to the plaintiffs. He afterwards sent the horses to the defendant's for sale by auction. The horses were entered in defendant's catalogue. The defendant knew nothing of the bill of sale. Before the auction Seaman sold the horses by private contract to one Townsend. The conditions of sale in the defendant's yard were the same whether horses were sold by auction or by private contract. The purchase-money was paid to the defendant, who deducted his commission and paid the balance to Seaman, and by Seaman's consent gave a delivery order to the purchaser. It was held by the Court of Appeal, overruling Lopes, J., that there was no conversion by the defendant; that the sale was not by him, but by Seaman; and that handing the delivery order to the purchaser at Seaman's request did not carry the case any further.

This decision, which, strange to say, does not appear to be reported elsewhere, seems to me to be one of great importance upon the law of conversion, and to be a long step in the direction which Brett, J., invited the House of Lords to take in *Hollins v. Fowler*. The goods were not re-delivered to the bailor, but were delivered to the buyer from the bailor with knowledge of the sale and with the intention of enabling it to be carried out. The defendant *qua* the giving the delivery order, seems to have been in exactly the same position as if he had carted the goods at the seller's instance to a railway station for delivery to the buyer under a contract in which he was a mere intermediary, which is precisely the position in which Brett, J., considered the defendants to be in *Fowler v. Hollins*. It seems to me, therefore,

¹ 40 L. T. N. S. 744.

² 27 W. R., at p. 777; s. c. 40 L. T. N. S., at p. 746.

³ 44 L. T. N. S. 767.

to be a decision of the Court of Appeal in favor of Brett, J.'s, view as against that of Martin, B., in *Burroughes v. Bayne*, and *Fowler v. Hollins*, and also, I think, against the opinion of Blackburn, J., in the same case in the House of Lords: see the illustration given by him of a railway company fixed with knowledge that the carriage is not a mere transfer of custody, but for the purpose of transferring the property from a *de facto* owner to one who was going to use up the goods. The court, in distinguishing *Cochrane v. Rymill*,¹ note the fact that the defendant in that case had a lien on the goods for an advance as well as that he effected the sale himself; but, having regard to the authorities, which I have already cited as to the position of an auctioneer, this superadded lien made no difference except as a fact negating the suggestion that he was a mere agent or "conduit-pipe" in that particular sale. Brett, L. J., clearly thought that had the sale in the case before him been the act of the auctioneer, and not of the parties themselves, he would have been guilty of conversion.

The next case is *Turner v. Hockey*,² of which the head-note is as follows: "An auctioneer who, in the ordinary course of his business, sells by public auction for A. goods ostensibly belonging to A., but really belonging to B., and without notice pays over the proceeds of sale to A., is not guilty of a conversion." The facts as to delivery are not stated; but I infer that delivery was made under the contract. If, therefore, the head-note correctly states the decision, it would be conclusive of this case, and Mr. Foote very properly relied upon it as decisive.

Two points, however, arise upon it. First, does the head-note correctly state the decision? Second, if it does, am I bound to follow it? In my opinion, if delivery under the contract be assumed, the proposition stated in the head-note is not law. It seems to me to be in direct conflict both with principle and with authority. It was questioned by Romer, J., in *Barker v. Furlong*,³ and it is observed upon in Messrs. Clerk & Lindsell's valuable treatise on Torts, at p. 171. It was decided as recently as 1887. I should therefore feel at liberty to act on my own judgment. On examining the case, however, I think the head-note goes far beyond the *decision of the court*, though some of the observations of Day, J., might seem to support it. The facts were as follows: The action was against a cattle salesman for conversion of a cow which was comprised in a bill of sale given by one Phillips to the plaintiff. Phillips took the cow to the market and placed her in the defendant's pen, giving the defendant instructions to sell her. The defendant had notice of the bill of sale. The defendant got an offer of £11 for the cow; *but, instead of selling on his own responsibility, he communicated it to Phillips, who accepted it.* The money was paid by the purchaser into the Cattle Exchange Bank to the defendant's account, and paid out to

¹ 40 L. T. N. S. 301.

² 56 L. J. Q. B. 801.

³ [1891] 2 Ch. at p. 183.

Phillips on an authority given by the defendant, Phillips having paid the defendant a commission of 5s. It does not clearly appear, therefore, that the defendant in fact did more than submit an offer; the bargain may have been concluded and the sale effected by Phillips and the purchaser without any further intervention on the part of the defendant, and in this view the case would be exactly within *National Mercantile Bank v. Rymill*,¹ and *Willes, J.*, seems to have so regarded it, as he treats it as covered by the illustration which I have quoted above, as put by *Bramwell, L. J.*, in *Cochrane v. Rymill*.² The decision of the court, therefore, does not support the head-note, and the case is no authority for the now defendant. On the other hand, the decision of *Romer, J.*, above cited, is directly in point, save that there the sale took place in a public room, which, as pointed out in the passage from *Williams v. Millington*,³ above cited, can make no difference. On the whole, therefore, I am of opinion that the defendants in this case transferred as far as in them lay the dominion over and property in the goods to the purchasers, in order that they might dispose of them as their own, and my judgment must, therefore, be for the plaintiffs for £29 10s. with costs.

*Judgment for plaintiffs.*⁴

JAMES DONAHUE v. BENJAMIN D. SHIPPEE.

IN THE SUPREME COURT, RHODE ISLAND, FEBRUARY 5, 1887.

[Reported in 15 *Rhode Island Reports*, 453.]

MATTESON, J.⁵ This is an action of trover for the conversion of a quantity of standing grass. The plaintiff purchased the grass growing on a parcel of land, and the Cranston Bleaching and Dyeing Company purchased the grass growing upon an adjoining parcel. There

¹ 44 L. T. N. S. 767.

² 40 L. T. N. S., at p. 746.

³ 1 H. Bl., at p. 84.

⁴ *Hardman v. Booth*, 1 H. & C. 803; *Ogden v. Benas*, L. R. 9 C. P. 513; *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Cochrane v. Rymill*, 27 W. R. 776, 40 L. T. Rep. 744, s. c.; *Nat. Bank v. Rymill*, 44 L. T. Rep. 767; *McEntire v. Potter*, 22 Q. B. D. 438; *Barker v. Furlong*, '91, 2 Ch. 172 (discrediting *Turner v. Hockey*, 56 L. J. C. L. 801; see 4 L. Q. Rev. 117); *Kleinwort v. Comptoir* [1894], 2 Q. B. 157; *Ganly v. Ledwidge*, Ir. R. 10 C. L. 33; *Delaney v. Wallis*, L. R. 14 Ir. 31; *Permynter v. Kelly*, 18 Ala. 716; *Marks v. Robinson*, 82 Ala. 69, 83 *Hudmon v. Dubose*, 85 Ala. 446; *Rogers v. Huie*, 1 Cal. 429; *Cerkel v. Waterman*, 63 Cal. 34; *Swim v. Wilson*, 90 Cal. 126 (overruling *Rogers v. Huie*, 2 Cal. 571); *Pool v. Adkisson*, 1 Dana, 110; *Kimball v. Billings*, 55 Me. 147; *McPheters v. Page*, 83 Me. 234; *Coles v. Clark*, 3 Cush. 399; *Hills v. Snell*, 104 Mass. 173, 177; *Robinson v. Bird*, 158 Mass. 357; *Koch v. Branch*, 44 Mo. 542; *Bercich v. Marye*, 9 Nev. 312; *Everett v. Coffin*, 6 Wend. 603; *Hoffman v. Carow*, 22 Wend. 235 (affirming s. c. 20 Wend. 21); *Dudley v. Hawley*, 40 Barb. 397; *Anderson v. Nicholas*, 5 Bosw. 121; *Courtis v. Kane*, 32 Vt. 232, 234; *Cone v. Iverson*, 4 Wyo. 203 *Accord*.

Roach v. Turk, 9 Heisk. 708 (overruling *Taylor v. Pope*, 5 Coldw. 413); *Frizzle v. Rundle*, 88 Tenn. 396 *Contra*. — Ed.

⁵ Only the opinion of the court is given. — Ed.

was no fence separating the parcels, nor any bounds to mark the line between them. The defendant, who was employed by the Cranston Bleaching and Dyeing Company, cut by its direction the grass purchased by it, and, not knowing where the boundary line was, unintentionally cut some of the plaintiff's grass. He himself, however, did nothing more than cut the grass. He left it on the ground where it was cut, and other employees of the Cranston Bleaching and Dyeing Company spread it, and, when it was sufficiently cured, raked it up, drew it away, and put it into the company's barn. Subsequently the plaintiff, having ascertained that the grass had been cut by the defendant, brought this action.

The question raised by the exceptions is, whether the mere cutting of the grass without removing it, or attempting to do so, and without preventing the plaintiff from removing it, amounted to a conversion.

We think the question must be answered in the affirmative. The cutting of the grass, as the grass of the Cranston Bleaching and Dyeing Company, with the intent that it should be appropriated to the company's use, was an act of dominion over it equivalent to an assertion of the company's ownership of it, and, therefore, an act necessarily inconsistent with the title of the plaintiff. Such an act is clearly a conversion. Remarks of Brett, J., in *Fowler v. Hollins*; note to *Donald v. Suckling*.¹ In 6 Bacon Abr. 677, the editor defines a conversion in the following words: "The action being founded upon a conjunct right of property and possession, any act of the defendant which negatives, or is inconsistent with, such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another's use." This language has been adopted in *Bristol v. Burt*; *Reynolds v. Shuler*; ² *Liptrot, Adm'r, v. Holmes*.³ In *Reid v. Colcock*,⁴ the court remarks: "Every assuming to dispose of the property of another, or the least intermeddling with it, in a manner subversive of the dominion which the owner has over it, is sufficient evidence of a conversion."

Nor does the fact that the cutting of the grass was unintentional, in the sense that it was done in ignorance of the location of the boundary line, make any difference. It was, nevertheless, a wrongful assumption of dominion over the property of the plaintiff in violation of his right. In *Boyce v. Brockway*,⁵ it is said: "Wrongful intent is not an essential element of the conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act of another assuming dominion or control over it." So, too, in *West*

¹ Bigelow, *Lead. Cas. on Torts*, 428.

² 5 Cow. 323.

³ 1 Ga. 391.

⁴ 1 Nott & McCord, 592, 598.

⁵ 31 N. Y. 490, 493.

Jersey R. R. Co. v. Trenton Car Works Co.,¹ the court says: "In every case in which the inquiry arises whether a conversion has been committed, the only point to be settled is whether the defendant has applied to his own use the property of another without his permission and without legal right. His motives for so doing, or the state of his knowledge with reference to the right of such owner, are of no importance, and cannot in any respect affect the case." And see, also, *Fowler v. Hollins*; *McCombie v. Davies*. And it has repeatedly been held that it is no protection to one who has received property and disposed of it in the usual course of trade that he did so in good faith, and in the belief that the person from whom he took it was the owner, if in fact the possession of such person was tortious. *Hardman v. Booth*;² *Everett v. Coffin*;³ *Williams v. Merle*; *Galvin v. Bacon*; *Carter v. Kingman*.⁴

Exceptions overruled; judgment of Court of Common Pleas affirmed, with additional costs of this court.

John Palmer, for plaintiff.

Ziba O. Slocum, for defendant.

BURDITT AND ANOTHER v. HUNT AND ANOTHER.

SUPREME JUDICIAL COURT, MAINE, JULY TERM, 1845.

[Reported in 25 Maine Reports, 419.]

TROVER for certain goods. The plaintiffs, to show title in themselves, offered a mortgage from Robert Kellen to them, without date, recorded Feb. 1, 1842, of "all and singular the goods, wares, and merchandise, stock, harness work, and other articles of every kind and description now in the shop occupied by me in said Bangor." The plaintiffs then introduced the subscribing witness to the mortgage, and proposed to prove by him that the mortgage was executed and delivered on Feb. 1, 1842. To this the defendants objected; but the testimony was admitted by Tenney, J., presiding at the trial.

It appeared from the evidence that the property was left in the possession of Kellen, the mortgagor, with authority to sell as agent for the plaintiffs, for cash and in small parcels. The sale of part of these goods by Kellen to Hunt, under which he claimed, was not within the authority, and the plaintiffs refused to ratify it. The exceptions state that it was contended on the part of McMullen, the other defendant, that he, as servant of Hunt, ignorant alike of the existence of the mortgage and of the terms of the contract of sale by Kellen to Hunt, and of any circumstances tending to show that the sale was invalid,

¹ 32 N. J. 517, 520.

² 6 Wend. 608, 609.

³ 1 H. & C. 803, 806.

⁴ 103 Mass. 517

was sent by Hunt to bear the articles from Kellen's shop to Hunt's; that as Hunt's servant he received them from Kellen, and deposited them in Hunt's shop, and had no further connection with them, and that therefore he was not liable to the plaintiffs in this action. The exceptions also state that there was evidence in the case tending to sustain McMullen's position.

The presiding judge instructed the jury that the mortgage vested in the plaintiffs' title to all the goods in Kellen's shop on the first day of February, and that if Hunt was liable in this action, and McMullen as his servant aided him in removing the goods, then McMullen was liable for all the goods he so removed.

The verdict was for the plaintiffs, and the defendants filed exceptions.

Rowe argued for the defendants.

Robinson, for the plaintiffs.¹

The opinion of the court was drawn up by

SHEPLEY, J. The goods having been left in the possession of the mortgagor with authority to sell them for cash in small parcels, he sold and delivered those for which this action was brought to the defendant Hunt; but in so doing exceeded his authority. There was testimony tending to prove that the other defendant, McMullen, as the servant of Hunt, was sent for them, and that he received them by the delivery of the mortgagor, and deposited them in Hunt's shop; that he was ignorant of the existence of the mortgage and of the terms of the sale to Hunt; and that he had no other connection with them.

The jury were instructed if Hunt was liable, and McMullen, as his servant, aided him in removing the goods, he would be liable for those which he removed. A servant, who receives goods delivered to him and carries and delivers them to his master, can be held responsible for them in action of trover only, on the ground that such a removal of them amounts to a conversion. If such a position could be maintained, common carriers and other persons, by receiving goods delivered to them by a person in possession of them, and carrying them to another place, would thereby be made liable for their value, if it should afterward be made to appear that the goods were delivered without authority from the owner. And yet the possession of personal property is *prima facie* evidence of ownership. Such a position cannot, however, be sustained. Conversion is the gist of the action of trover, and conversion is a tort. *Draper v. Fulkcs*,² *Fuller v. Smith*.³ When goods come to the possession of a person by delivery or by finding, he is not liable in trover for them without proof of a tortious act. 2 Saund. 47 e; *Mulgrave v. Ogden*.

The reception of them by delivery from one whom he is entitled to regard as the owner, and the conveyance from him to another, to whom they are sent, are not tortious acts. In the case of *Parker v. Godin*, the defendant, who acted as the friend or servant of another, was held

¹ The arguments of counsel are omitted. — Ed.

² Yelv. 165.

³ 3 Salk. 366.

liable in such an action, because he pawned the goods in his own name, which had been improperly delivered to him. In the case of *Perkins v. Smith*, a bankrupt after the act of bankruptcy delivered goods to a servant to be carried to his master, and the servant sold them for his master's use, and was held to be liable for them in such an action. In both these cases the servant was considered to be liable only on the ground that they committed tortious acts by pawning and selling the goods. A refusal to deliver goods on a demand made by the owner may be a tortious act and a conversion by one who is in possession of them. There is no evidence exhibited in this case tending to prove that the servant committed any tortious act, or that he assisted his master in such an act.

*Exceptions sustained, and new trial granted.*¹

COLES v. F. WRIGHT.

IN THE COMMON PLEAS, NOVEMBER 28, 1811.

[*Reported in 4 Taunton, 198.*]

MANSFIELD, C. J.² This was an action brought by the plaintiff, as assignee of the effects of Samuel Wright, against the defendant, to recover money alleged to be had and received by the defendant, to the plaintiff's use. The ground of the action is, that Samuel Wright the bankrupt had been committed to prison, and after he had been committed to prison, he employed Robins, an auctioneer, to sell certain goods, who delivered £79, the money produced by the sale, to the defendant, to be carried to his brother, S. Wright. S. Wright received it, and paid away part of it, and it does not appear what he did with the rest: the defendant then having received this sum of £79, it is said the bankrupt's assignees are entitled to recover, because S. Wright became a bankrupt by continuing two months in prison; and upon the trial the defence was, that the defendant received the money merely as a messenger, or carrier of the money between the one party and the other, and that as such, and having paid it over, he was not liable. We find no case in which this doctrine of relation of an act of bankruptcy, committed by suffering imprisonment, has been carried so far as to charge a man with money received for a trader lying in prison, at a time before he became a bankrupt. There was evidence that the brother knew he was in prison; and it was urged for the plaintiffs,

¹ *Nelson v. Iverson*, 17 Ala. 216; *Freeman v. Scarlock*, 27 Ala. 407, 418 (*semble*); *Hudmon v. Dubose*, 35 Ala. 446; *Hill v. Hayes*, 38 Conn. 532; *Smith v. Colby*, 67 Me. 169, 171; *Strickland v. Barrett*, 20 Pick. 415; *Parker v. Lombard*, 100 Mass. 405; *Metcalf v. McLaughlin*, 122 Mass. 84; *Gurley v. Armstead*, 148 Mass. 267; *Turner v. Brown*, 6 Hun, 331 (*semble*); *Walker v. First Bank*, 43 Oreg. 102; *Deering v. Austen*, 34 Vt. 330 *Accord*.

See also *Mires v. Solebay*, 2 Mod. 242.—ED.

² Only the opinion of the court is given.—ED.

that inasmuch as every man is supposed to know the law, the defendant was conusant that his brother would thereby become a bankrupt. There was also evidence of a meeting of creditors to consider the state of S. Wright's circumstances, but no evidence that the brother knew it: according to the decided cases the action might be brought against the auctioneer; but it seems a monstrous thing to say, that every one who takes money in the character of a messenger or bearer, should be so liable; it may happen to pass through the hands of two or three persons, who would each be liable to such an action. No case goes that length, and the doctrine of the relation of the act of bankruptcy, is in all cases extremely hard, and in many shocking, and it is not to be carried further than we are compelled to carry it: and therefore we think we are bound to say that the defendant is not liable to this action, and the rule *nisi* to enter a nonsuit must be made

*Absolute.*¹

¹ *Tope v. Hockin*, 7 B. & C. 101 (*semble*) *Accord*.

POND v. UNDERWOOD.

AT NISI PRIUS, BEFORE LORD HOLT, C. J., MICHAELMAS TERM, 1706.

[*Reported in 2 Lord Raymond*, 1210.]

IN an *indebitatus assumpsit* brought by the plaintiff, Armanuell Pond, as executor of Charles Pond, deceased, for money received by the defendant, owing to the testator for wages (he being a seaman) after the testator's death. On not guilty pleaded, it appeared on evidence at the trial, that before the will was found, administration, &c., was granted to Anne Pond, a sister of Charles Pond, and that she made a warrant of attorney to the defendant to receive this money, being £21, by virtue of which warrant he did receive it, and paid it to Anne before any notice given of this will. And by the direction of the Lord Chief Justice Holt, before whom it was tried at Guildhall the sittings after Michaelmas term, 1705, the plaintiff was nonsuited: for by him, though all acts done by an administrator, where there is a will are void, and such an action in this case would lie against Anne Pond; yet it is hard to make the defendant liable, having paid the money over, before he knew of the will, to the administrator.*

* Two years before, Trevor, C. J., made a contrary ruling in *Jacob v. Allen*, Salk. 27. In *Sailler v. Evans*, 4 Burr. 1984, 1986, it is reported that "Lord Mansfield expressed a dissent to the case of *Jacob v. Allen*, and his approbation of *Pond v. Underwood*, which is contrary to it."

In *Sharland v. Mildon*, 5 Hare, 469, the defendant, mistakenly believing that A. had proved a will and taken out letters of administration, at A.'s request collected certain debts due to the estate, and paid the money to A. The defendant was charged as executor *de son tort* by a subsequent administrator *d. m. a.* See also *Ex parte Edwards*, 13 Q. B. Div. 747, 751. — ED.

NATHANIEL B. SPOONER v. EPHRAIM B. HOLMES.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1869.

[Reported in 102 *Massachusetts Reports*, 503.]

GRAY, J.¹ This is an action of tort, in the nature of trover, for certain coupons of United States bonds, alleged in the declaration to be the property of the plaintiff and to have been converted by the defendant to his own use. The undisputed evidence at the trial showed that the bonds had belonged to the plaintiff, and had been stolen from him, and delivered by one who received them from the thief to the defendant, and by him sold and turned into money, which he is admitted to have paid over to his principal. But the jury have found that in so doing the defendant acted only as agent of the person from whom he received them, and did not know, and was not guilty of gross negligence in not knowing, that that person had come dishonestly by them. It does not appear that the plaintiff ever demanded of the defendant either the coupons or their proceeds, or that the defendant personally derived any benefit from his acts. The principal question in the case is, whether, under these circumstances, he is liable in this action. This is an important question, and has received great consideration from the court.

An action of tort for the conversion of personal property, under our present system of pleading, requires such evidence to support it as would have proved a conversion in an action of trover at common law; and cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property. *Fouldes v. Willoughby*, *Heald v. Carey*,² Gen. Sts. c. 129, § 81, *Robinson v. Austin*,³ *Loring v. Mulcahy*, *Parker v. Lombard*.⁴ In the last case, Mr. Justice Hoar says that if a bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion; and cites *Strickland v. Barrett*,⁵ and *Leonard v. Tidd*. So where chattels were delivered by the owner to a bailee, with the right to purchase them by paying a certain price, so that he had the actual legal and rightful possession, although he had not performed the condition on which he was to have the absolute title, and he sold them to a third person, who resold them before any demand made upon him and without notice of the agreement between his vendor and the original owner, he was held not to be liable to the latter in trover. *Vincent v. Cornell*.⁶ See also

¹ Only the opinion of the court is given. — ED.

² 11 C. B. 977.

³ 2 Gray, 564.

⁴ 100 Mass. 405.

⁵ 20 Pick. 415.

⁶ 18 Pick. 294.

Day v. Bassett.¹ And trover will not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful. Bul. N. P. 47; Powell v. Hoyland.²

In the case of a sale of goods, indeed, the purchaser is bound to look to his title, and, if he obtains them from one who is not the lawful owner or his authorized agent, cannot hold them against him. 2 Kent Com. (6th ed.) 324. If the goods have been stolen, the property does not pass by delivery, and a person who derives his title from the thief gains no rights as against the lawful owner, and if he either refuses upon demand to deliver them up, or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover. Dame v. Baldwin,³ Heckle v. Lurvey.⁴ Upon this principle, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen; or a person who in good faith buys a stolen horse, and afterwards exercises dominion over him by letting him to a third person; is liable to the rightful owner in trover, without a previous demand. Hoffman v. Carow,⁵ Coles v. Clark,⁶ Gilmore v. Newton.⁷ Yet even in the case of stolen goods, a mere naked bailee, who does no act, and has no intent, to convert them to his own use, or withhold them from the owner, and, before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. Loring v. Mulcahy.

But, in the opinion of a majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the government, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are therefore not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. Wookey v. Pole,⁸ Gorgier v. Mieville,⁹ Commonwealth v. Emigrant Industrial Savings Bank.¹⁰ The rule of *caveat emptor* does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank, unless it is proved that he did not take it in good faith and for valuable consideration; and that his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. Worcester County Bank v. Dorchester & Milton Bank,¹¹ Wyer v. Dorchester & Milton Bank,¹² Raphael v. Bank of England.¹³ And, according to the great weight of authority, the same rule applies to bills of exchange or promissory notes payable to bearer. Goodman v. Simonds.¹⁴

¹ 102 Mass. 445.² 6 Exch. 67.³ 8 Mass. 518.⁴ 101 Mass. 344.⁵ 22 Wend. 285.⁶ 3 Cush. 399.⁷ 9 Allen, 171.⁸ 4 B. & Ald. 1.⁹ 4 D. & R. 641; s. c. 3 B. & C. 45.¹⁰ 98 Mass. 12.¹¹ 10 Cush. 488.¹² 11 Cush. 51.¹³ 17 C. B. 161.¹⁴ 20 How. 343.

The jury have found that the defendant took these coupons in good faith, without gross negligence, and as agent of his employer. He thus acquired a lawful possession of them, which was no evidence of a conversion. He then, before any demand or notice from the rightful owner, transferred them by delivery, and exchanged them for money, the amount of which he paid over to his employer. This case does not present the question whether the defendant could have been held liable to the rightful owner for the coupons or the proceeds while in his own hands, nor whether he could be held to have paid value for them. The single question is, whether he has been guilty of a wrongful conversion; and, considering the nature of the instruments, and the fact that the defendant was acting in good faith, without gross negligence, as agent only, without himself receiving any benefit from the transaction, a majority of the court is of opinion that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to his employer, constituted a conversion for which he can be held liable in an action of tort in the nature of trover. Addison on Torts, (3d ed.) 317. The instructions to the jury were therefore quite favorable enough to the plaintiff.

*Exceptions overruled.*¹

¹ Kimball v. Billings, 55 Me. 147 *Contra*. See Hill v. Hayes, 38 Conn. 532.—ED.

SECTION II. (*continued.*)

(g) MISCELLANEOUS ACTS OF DOMINION.

LORD PETRE v. HENEAGE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., EASTER TERM, 1699.

[Reported in 12 *Modern Reports*, 519.]

TROVER¹ by the plaintiff, as administrator *cum testamento annexo* of the late Lord Petre, against the wife of the first executor, for a necklace of pearl, said to have been in the family for many generations, and worn as a personal ornament by Lady Petre for the time being, or for default of such by the lady dowager, *pro tempore*.

And here, by HOLT, C. J., the wearing of a pearl is a conversion.²

KEYWORTH v. HILL AND WIFE.

IN THE KING'S BENCH, JUNE 14, 1820.

[Reported in 3 *Barnewall & Alderson*, 685.]

TROVER against husband and wife, for a bond and two promissory notes. The declaration stated that the defendants converted and disposed of the same to their own use. Plea, not guilty. Verdict for the plaintiff.³

ABBOTT, C. J. The question, in this case, arises upon a motion in arrest of judgment. The ground of the objection is, that inasmuch as a married woman cannot acquire property, the conversion of the property can only be the act of the husband, and must be so charged. If the allegation in the declaration, that the defendants converted the property to their own use, necessarily imported an acquisition of property by them, there would be considerable weight in the objection. It seems to me, however, that that is not the necessary import of the expression, for a conversion may be by an actual destruction of the

¹ Only so much of the case is given as relates to the question of conversion. — Ed.

² See *Poulton v. Wilson*, 1 F. & F. 403; *Gray v. Crocheron*, 8 Port. 191; *Gentry v. Madden*, 3 Ark. 127; *Clark v. Whitaker*, 19 Conn. 319; *Adams v. Mizell*, 11 Ga. 106; *Barton v. White*, 1 Har. & J. 579; *Dickey v. Franklin Bank*, 32 Me. 572; *Lathrop v. Blake*, 23 N. H. 46; *Chesh. R. R. Co. v. Foster*, 51 N. H. 490; *Western Co. v. Franklin Co.*, 70 N. H. 37; *Spencer v. Blackman*, 9 Wend. 167; *Nauman v. Caldwell*, 2 Sweeny, 212; *Collins v. Bennett*, 46 N. Y. 490; *Scruggs v. Davis*, 5 Sneed (Tenn.), 261; *Arnold v. Kelly*, 4 W. Va. 642. Compare *Chandler v. Partin*, 2 Mill, C. R. 72; *Quay v. M'Ninch*, 2 Mill, C. R. 78. — Ed.

³ The statement of the case is abridged, and the arguments of counsel and the concurring opinions of HOLROYD and BEST, JJ., are omitted. — Ed.

property. And if the allegation does not necessarily import that the defendants acquired a property, we are bound, after the verdict, to consider the conversion to have taken place by other means than by the acquisition of property. I am, therefore, of opinion that the declaration is sufficient, and that this rule should be discharged.

BAYLEY, J. It is quite clear that in trespass the husband and wife might be jointly sued. The reason of which is, that the action is founded on the wrongful act of the defendants. Now, it seems to me, that the action of trover is founded on the tort also. The cases cited on the part of the defendant proceed upon the supposition that the conversion could only take place by the defendants acquiring a property. It seems to me, however, that in trover the foundation of the action is not the acquisition of property by the defendants, but the deprivation of property to the plaintiffs. If the wife were to take up a book, and her husband desired her to put it in the fire and burn it, and she did burn it, that would be a conversion, and yet the husband and wife would acquire no property; so, if a man takes my horse and rides it, I may bring trover for the temporary conversion. And if there can be any case of a conversion without an ultimate change of property, we are bound, after verdict, to imply that it was such a conversion as the wife might be guilty of.

*Rule discharged.*¹

SUMMERSETT v. JARVIS AND OTHERS.

IN THE COMMON PLEAS, JUNE 29, 1821.

[Reported in 3 Broderip & Bingham, 2.]

TROVER for sundry account-books, and other property. At the trial, before Dallas, C. J., Guildhall sittings after Hilary term last, the defendants, who were assignees under a commission of bankrupt, which had been issued against the plaintiff (a farmer, who kept hounds), proved that he, having purchased for his hounds a number of dead horses, had been accustomed to sell the skins and bones; and, upon one occasion, said he should make a good thing of them. The plaintiff's witnesses said the dead horses were purchased expressly for the dogs, and never with any view of ulterior profit. They also proved

¹ *Marshe's Case*, 1 Leon. 312; *Draper v. Fulkes*, Yelv. 165; *Baldwin v. Mortin*, Ow. 48; *Coxe v. Cropwell*, Cro. Jac. 5; *Hodges v. Sampson*, W. Jones, 443; *Newman v. Cheyney*, Latch. 126; *Catterall v. Kenyon*, 3 Q. B. 310; *Heckle v. Lurvey*, 101 Mass. 344 (but see *Tobey v. Smith*, 15 Gray, 535); *Kowing v. Manley*, 49 N. Y. 192 *Accord*.

Berry v. Nevys, Cro. Jac. 661; *Rhemes v. Humphreys*, Cro. Car. 254; *Perry v. Diggs*, Cro. Car. 494; *Bullen's Case*, W. Jones, 264; *Gallop v. Symson*, Style, 115; *Note*, 1 Brownl. 3; *Reames v. Humphries*, 1 Roll. Abr. 348 *Contra*. See also *Clark v. Pew*, Style, 18; *Rowell v. Keefe*, 6 Rich. 521.

Compare *Mires v. Solebay*, 2 Mod. 242. — Ed.

that the defendant, Jarvis, in the character of assignee, had insisted on the plaintiffs delivering up his books, and that he thereupon delivered them; but it was not proved that the plaintiff had demanded the books of the defendants previously to the commencement of this action. The jury having found a verdict for the plaintiff, and that he was not a trader when the petitioning creditor's debt accrued,

Taddy, Serjt., on a former day, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit instead, or for a new trial, on the ground first, that the verdict was against evidence; secondly, that the plaintiff, having delivered his books for a legal purpose to the assignees, when called on to do so, had not parted with them on compulsion, so that, until a formal demand was made by the plaintiff, the defendants were guilty of no conversion; and such demand having never been made, the plaintiff could not maintain his action. *Nixon v. Jenkins*.¹

Lens, Serjt., for the plaintiff.²

THE COURT expressed a clear opinion that the facts of this case did not constitute a trading, within the intent of the bankrupt laws; that the defendants having taken the books when they were armed with the authority of assignees, the plaintiff must be deemed to have delivered them up on compulsion; that the defendants were thereby guilty of a conversion; and that, consequently, the plaintiff's action was maintainable, without any formal demand on his part. *Rule discharged*.³

FEATHERSTONHAUGH v. JOHNSTON.

IN THE COMMON PLEAS, APRIL 13, 1818.

[Reported in 8 Taunton, 237.]

TROVER. At the trial of the cause before Park, J., at the sittings at Guildhall after the last term, it appeared that the plaintiff agreed to send a cargo of bottles by a ship of one Humble, from Sunderland to London. A dispute afterwards arose respecting the payment of freight and demurrage, whereupon the ship was ordered by Humble to sail, and the bottles were consigned by him to the defendant, who, without notice of any adverse claim, sold a part. Afterwards the plaintiff informed the defendant that the bottles were his property, and demanded to have them delivered up to his disposal; to which the defendant answered that the greater part had been already sold. It was contended at the trial that the defendant was liable in this action only for the value of the part remaining unsold in his possession. The

¹ 2 H. Bl. 135.

² The argument for the plaintiff is omitted. — Ed.

³ *Grainger v. Hill*, 4 B. N. C. 212; *Powell v. Hoyalnd*, 6 Ex. 67 (*semble*) *Accord*. — Ed.

jury found a verdict for £717, being the value of the whole ; but leave was given to move to reduce it to £347, the value of the part remaining unsold.

Hullock, Serjt., now moved accordingly.¹

GIBBS, C. J. I agree to the proposition that the demand and refusal in the case cited did not amount to a conversion. But it sometimes happens that two points might be made in a case, and only one is made ; and I cannot take the decision on that point as an authority to decide the other. In the present case, the defendant has been proved to have actually sold the goods in dispute, and a sale alone has been held, in many cases, to amount to a conversion. The principle of law is against the defendant, who has applied the goods to his own use. In the case of *Horwood v. Smith*,² an action of trover was brought by the owner of goods against the defendant, who had sold them, and it appeared that the goods had been stolen, and sold in market overt to the defendant ; and afterwards, and before the conviction, notice was given to the defendant by the plaintiff that the goods were his property, and, nevertheless, the defendant sold them. After conviction the action was brought ; and it was held that the plaintiff could not recover, because the sale in market overt protected the goods until conviction, and therefore the defendant was not liable for a sale during the protection ;³ but, unquestionably, if the defendant there had sold after protection had ceased, the action would have lain. Therefore, I think there is no ground for the present motion.

DALLAS, J., BURROUGH, J., and PARK, J., concurred.

*Rule refused.*⁴

TRAYLOR AND ANOTHER v. HORRALL.

SUPREME COURT, INDIANA, AUGUST 22, 1837.

[Reported in 4 *Blackford*, 317.]

BLACKFORD, J. Trover by Horrall against Traylor, Capehart, and Cain. Plea : Not guilty. The only evidence respecting the conversion was as follows : The plaintiff had put his corn into a crib, which he had hired for the purpose of Kinman, and which stood on Kinman's land. The defendants and some other persons being present where the crib of corn was, Capehart offered the corn at public sale, and Traylor bid it off

¹ The argument of *Hullock* is omitted. — ED.

² 2 Term Rep. 750.

³ Similarly, the sale by the vendee of an infant, before the latter elects to avoid the sale, is not a conversion. *Carr v. Clough*, 26 N. H. 280. — ED.

⁴ *Vandrink v. Archer*, 1 Leon. 221; *Bloxam v. Hubbard*, 5 East, 407; *Kyle v. Gray*, 11 Ala. 233; *Kenney v. Ranney*, 96 Mich. 617; *Harris v. Cable*, 104 Mich. 365; *Tomkins v. Haile*, 3 Wend. 406; *McDonnell v. Buffalo Co.*, 193 N. Y. 92; *Morrill v. Moulton*, 40 Vt. 242; *Newsum v. Newsum*, 1 Leigh, 86; *Boldewahn v. Schmidt*, 89 Wis. 444 *Accord.* — ED.

at the price of thirty-one dollars. Cain said that he had the officers bound for his money. The plaintiff was also present, and forbid any person from selling or removing the corn, claiming it to be his. Cain afterwards said that he had got his money from Capehart. The defendants demurred to the evidence, and agreed that, if judgment were rendered for the plaintiff, the court might assess the damages. The demurrer was sustained as to Cain, but there was a judgment against the other defendants for seventy-four dollars in damages, together with costs.

We are satisfied that the record shows no evidence conducing to prove a conversion in this cause, and that the judgment for the plaintiff is consequently erroneous.

To support the action of trover, there must be proof of property in the plaintiff, possession to have been in the defendant, and a conversion by the defendant. Buller's N. P. p. 83. The gist of the action is the conversion; and unless the defendant has had an actual or virtual possession of the goods, he cannot be charged with a conversion of them to his own use.

In the present cause it does not appear why the form of a public sale of the corn in question took place. It is not shown that Capehart, the alleged seller, had seized the property under any process of law, or that at the time of the sale, or at any other time, he had or pretended to have any possession of it whatever. Neither was there any attempt to prove that Traylor, the purchaser, ever took possession of the property, or exercised any act of ownership over it.¹

The case of *Bristol v. Burt* is referred to by the plaintiff. But the court there expressly say that the defendant had exercised the highest and most unequivocal acts of dominion and control over the goods, not only by claiming jurisdiction over them, but by placing armed men near them to prevent their removal. They say, further, that the defendant thus detained the goods for several months, and that a charge was therefore brought upon the plaintiff. The court, in that case, do not appear to have had any idea that the suit could be maintained without showing that the defendant had intermeddled with the goods, and had for a time excluded the plaintiff from their possession. They rely on *Baldwin v. Cole*. The plaintiff had there sent his servant with some tools to work in the queen's yard for hire. The plaintiff, some time afterwards, having taken away his servant, sent for the tools, but the defendant refused to deliver them up. Trover was then brought for the tools, and the action was sustained on the ground that, as the defendant had wrongfully undertaken to detain them, he took upon himself the right to dispose of them, which was a conversion. The case in 6 Mod. Rep. is settled law, and being relied on in *Bristol v. Burt*, it shows the ground upon which the latter case was intended to be placed by the court.

¹ Had the purchaser taken possession in pursuance of the sale, the seller as well as the purchaser would have been guilty of a conversion. *Mead v. Thompson*, 78 Ill. 62; *Ramsby v. Beezley*, 11 Oreg. 49; *Northrup v. Trask*, 39 Wis. 515. — Ed.

In *M'Combie v. Davies* the plaintiff, by his agent, bought some tobacco which was in the king's warehouse; but the agent took the transfer of the tobacco on the warehouse books in his own name. The agent afterwards pledged the tobacco in his own name with the defendant, and transferred it into the defendant's name on the books in the warehouse. The plaintiff demanded the tobacco of the defendant, who refused to deliver it up until the debt for which it was pledged should be paid. The plaintiff then sued the defendant in trover for the tobacco. It was strongly contended at the trial that there had been no conversion; and the plaintiff was nonsuited. The nonsuit, however, was subsequently set aside, and the plaintiff recovered. In that case the defendant, by the transfer to him on the dock books, had the virtual possession and exclusive control of the property, and he wrongfully refused to deliver it to the rightful owner.

In a subsequent case, Chief Justice Best took occasion to say that Lord Ellenborough, in *M'Combie v. Davies*, had gone to the extreme verge of the law; that as far as that he should go himself; but that in the case before Lord Ellenborough the state of the property was changed, because there had been a transfer in the dock books, which, it was well known, is as much a transfer, for the purposes of trade, as an actual removal from one warehouse to another; and that there was, in that case, the exercise of dominion over the goods. *Mallalieu v. Laugher*.

The cause which we are now to decide is very different from any of those to which we have referred. For anything that the record before us presents, the plaintiff may have always continued in the undisturbed possession of the corn in the place where he originally deposited it, or he may have sold it, or have otherwise converted it to his own use.

DEWEY, J., having been concerned as counsel in the cause, was absent.

Per Curiam. The judgment, &c., against the plaintiffs in error is reversed, with costs. *Cause remanded, &c.*¹

¹ *Cuckson v. Winter*, 2 Man. & Ry. 313; *Herron v. Hughes*, 25 Cal. 555; *Fuller v. Tabor*, 39 Me. 519; *Davis v. Buffum*, 51 Me. 160; *Dean v. Cushman*, 95 Me. 454; *Burnside v. Twitchell*, 43 N. H. 390; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Andrews v. Shattuck*, 32 Barb. 396; *Glover v. Riddick*, 11 Ired. 582; *Huddleston v. Currin*, 4 Humph. 237; *Irish v. Cloyes*, 8 Vt. 30; *Northrup v. Trask*, 39 Wis. 515; *Williams v. Feters*, 115 Wis. 314. *Accord.* Compare *Penny v. State*, 88 Ala. 105.

The holder of a prior unrecorded mortgage of a chattel may charge as a converter the mortgagor who makes a later mortgage which is recorded. *Ivers Co. v. Allen*, 101 Me. 218. — Ed.

PENNY v. THE STATE.

IN THE SUPREME COURT, ALABAMA, NOVEMBER TERM, 1889.

[Reported in 88 Alabama Reports, 105.]

CLOPTON, J.¹ The second count of the indictment is founded on section 3795 of Code 1886. Before the offence with which the defendant is charged is made out, it must be shown that he was the agent or servant of the owner of the cotton; that it came into his possession by virtue of his employment; and that he has embezzled, or fraudulently converted it to his own use, or fraudulently secreted it with intent to convert it to his own use.

Assuming the facts to be as testified by the State witnesses, and not regarding the statements and explanations of defendant, they are: The owner of the cotton employed him to haul seven bales from his gin house to a factory at Cottondale, about ten miles distant, and deliver them to the manager of the factory. By virtue of his employment, he took possession of, and carried the seven bales to the factory, taking one bale the first load, and two at each succeeding load. He delivered the seven bales to the manager of the factory, taking the receipt for the bale first hauled in the name of his son, Lane Penny, which bale was marked, after leaving the gin-house, with the letters L. P.; and for the other six bales he took receipts in the name of the owner. On being questioned, shortly after he finished hauling, as to the number of bales he had carried, he replied, only six; but, on being pressed, admitted he had carried seven. Soon after this, he delivered all the receipts to the agent of the owner. On these facts, defendant requested the court to give the affirmative charge in his favor.

Conversion has been defined to be "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition, or the exclusion of the owner's rights." *Conner v. Allen*; ² *Threat v. Stamps*.³ It is not pretended that there was any secretion, waste, destruction, or wrongful taking of the bale of cotton. Defendant hauled and delivered as directed by the owner. The only acts done by him, not in accord with his duty, were marking the bale and taking a receipt therefor in the name of his son. These acts do not, of themselves, constitute an exercise of dominion in exclusion of the owner's rights, nor an appropriation to defendant's own use and beneficial enjoyment; nor withholding from the possession of the owner; nor an alteration of the condition of the cotton. The receipt may have armed defendant with power to exercise dominion, and to withhold the cotton from the possession of the owner; it may be the assertion of an inconsistent claim or right;

¹ Only the opinion of the court is given. — Ed.

² 33 Ala. 515.

³ 67 Ala. 96.

but the acquisition of such power, and the assertion of such claim or right, do not constitute a conversion of the cotton itself. To complete a conversion, the assumed power must be exercised to the alteration of its condition, or to the exclusion of the owner's rights. Defendant's taking the receipt and marking the bale as was done, may be evidence of an intent to claim and appropriate the cotton to his own use; but the mere intent is not sufficient. Delivery of the receipt to the owner was an abandonment of such purpose.

The court erred in refusing to charge the jury, that if they believed the evidence, they must find defendant not guilty.

Reversed and remanded.¹

JAMES M. NELSON v. OLIVER WHETMORE.

IN THE COURT OF APPEALS, SOUTH CAROLINA, JANUARY, 1845.

[Reported in 1 Richardson, 318.]

BEFORE Wardlaw, J., at Charleston, Spring Term, 1844.

This was an action upon the case to recover the value of a slave named Frank, the property of the plaintiff — said to have been lost through the wrongful acts of the defendant.

There were three counts in the declaration. The first count was in trover.²

Frank was a bright mulatto slave belonging to the plaintiff. In June, 1841, he ran away. At Fayetteville he represented himself to the defendant, who was then travelling from the South to his home in New York, as a free mulatto, and asked him to take him on as his servant, for the sake of cheapness. The defendant acceding to his request, Frank travelled as the defendant's servant as far as Washington, where he disappeared.

The presiding judge refused a motion for a nonsuit, and submitted the facts to the jury on the first count. Verdict for the plaintiff for \$1,000. The defendant moved for a nonsuit or a new trial.

F. D. Richardson, for the motion.

Dukes and Thomson, contra.

Curia, per WARDLAW, J. The serious question is whether there was a conversion.

Conversion is an appropriation of another's property; change of ownership is implied by it. The change may be temporary or per-

¹ A pledgee of shares standing in the name of the pledgor is not guilty of a conversion in surrendering the certificates and taking out new ones in his own name or in a trustee for himself, there being no design to deprive the pledgor of his rights in the shares. *Terry v. Birmingham Bank*, 93 Ala. 599; *Holmes v. Day*, 103 Mass. 306; *Fay v. Gray*, 124 Mass. 500, 503. — Ed.

² Only the report on this count is given. The statement of facts has been considerably abridged, and the arguments of counsel are omitted. — Ed.

petual, but so strongly has our court insisted on this change as resulting from conversion, that when a verdict in trover is rendered whilst the chattel remains out of the possession of the plaintiff, the judgment for the plaintiff is itself without satisfaction, (which satisfaction is insisted upon elsewhere),¹ considered here to be an acknowledgment by the plaintiff that the title has by conversion been transferred from him. *Rogers and Thompson v. Moore*;² *Welburn ads. Bogan*.³ Of the conversion, evidence may arise from a tortious taking, from a refusal to deliver upon demand, or from use negating the plaintiff's right. Any act in exclusion or defiance of the plaintiff's right, any assumption of property and of the right of disposition, any intermeddling indicating a claim of ownership, any assertion of the control which belongs to the owner, whether for the benefit of the defendant or of a third person, may furnish proof of the conversion. But the idea of *property* is of the essence of a conversion. Even where the chattel from its nature is necessarily known to be property, an interference with it, under circumstances which show the owner's right to be undisputed, even with injurious consequences to the owner, does not amount to a conversion; as where goods are thrown overboard to save a ship,⁴ or where a work of charity or kindness to the owner is intended.⁵ No intention of gain to the wrongdoer, or to anyone else, is essential, if an injury be done to the owner by an act negating his right of property. But when the chattel is not known to be property, there can be no interference with the ownership, and no conversion without an appropriation. In such a case, a defendant might in some other form of action be made to answer for any benefit acquired by himself, or for any injury done to the plaintiff by a wrongful act, but if he did not use the chattel as property, he could not in *trover* be held to have converted it.

It is, then, in the case before us, essential to inquire whether the defendant knew Frank to be a slave. If he did, his acts of interference may amount to an assertion of his right as owner, and the consequence of these acts may be damages which have resulted from his conversion. But if he did not, the treatment of Frank as a servant, and consequent facilities of escape afforded to him, may have been acts in themselves lawful — certainly did not indicate an assertion of property.

A new trial is therefore ordered.

RICHARDSON, O'NEALL, BUTLER, and FROST, JJ., concurred.⁶

¹ 8 Cowen, 43.

² Rice, 60.

³ 1 Speers, 182.

⁴ 2 Bulst. 280.

⁵ 4 Esp. 165.

⁶ *Quay v. M'Ninch*, 2 Mill C. R. 78 *Accord.* — Ed.

THOROGOOD v. ROBINSON.

IN THE QUEEN'S BENCH, JANUARY 15, 1845.

[Reported in 6 Queen's Bench Reports, 769.]

CASE for an excessive distress, with a count in trover, for lime, flints, and breeze. Pleas: To the count in trover 1, Not guilty; 2, Not possessed. Issues thereon. No question arose on the counts for an excessive distress.

On the trial, before Lord Denman, C. J., at the Middlesex sittings after last Michaelmas term, it was proved for the plaintiff that he was a lime-burner, and, in January, 1844, was in possession of some land, and of the lime, breeze, &c., in the declaration mentioned, which were lying on the land. The lime had been burnt in kilns on the premises from chalk dug there by the plaintiff. The defendant had recovered judgment in ejectment for the land, and, on the day mentioned in the declaration, he entered under the writ of possession, and turned two of plaintiff's servants off the premises, who at the time were loading a barge there with part of the lime. He refused to let them do anything to the kiln fires, or put any more of the lime on the barge. The defendant's evidence showed that he was entitled to the land as landlord of a person in whose absence the plaintiff had entered without title. The Lord Chief Justice told the jury that it was not every dealing with another person's goods that amounted to a conversion, but only such as deprived the real owner of them; that under the circumstances it was reasonable that the plaintiff should have applied to the defendant to have the articles which belonged to plaintiff delivered to him again; but that it was a question for the jury whether the conduct of the defendant was a conversion of the lime and breeze. Verdict for defendant on both issues.

Knowles now moved for a new trial, on the ground that the verdict on both issues was against the evidence.¹

LORD DENMAN, C. J. In leaving this case to the jury, I endeavored to act in conformity with the decision of this court in the case of *Needham v. Rawbone*,² and I said that it was a question for the jury whether the conduct of the defendant in turning the plaintiff's servants off the premises, and not letting them take away the lime and breeze, amounted to a conversion or not. I think the jury might fairly find that it did not. The defendant entered the premises with right, and had a right to turn off the plaintiff's servants. The plaintiff certainly had a right to the goods; but he should have sent some one with a proper authority to demand and receive them. If the defendant had then refused to deliver them, or to permit the plaintiff or his servants to remove them, there would have been a clear conversion;³ but it does

¹ The argument for the plaintiff is omitted. — Ed.

² 6 Q. B. 771, n.

³ *Badger v. Batavia Co.*, 70 Ill. 302 *Accord.* — Ed.

not necessarily result from the facts proved in this case that the defendant was guilty of a conversion.

PATTERSON, J. The mere turning the plaintiff's servants off the premises could not amount to a conversion of the goods; for the defendant had a right to turn the servants off.

COLERIDGE, J. Neither the plaintiff nor his servants had any right to be upon the land; nor was the defendant bound to let them remain there for the purpose of removing the plaintiff's goods; what he was bound to do was, on demand, to let the plaintiff remove the goods, or to remove them himself to some convenient place for the plaintiff.

WIGHTMAN, J., concurred.

*Rule refused.*¹

NICHOLS v. NEWSOM.

SUPREME COURT, NORTH CAROLINA, JUNE, 1813.

[*Reported in 2 Murphy, 302.*]

THIS was an action of trover for a quantity of lightwood set as a tar-kiln on the defendant's land, but not banked or turfed. Upon the trial it appeared that a judgment had been obtained against the defendant, on which an execution was issued and levied on the said lightwood, which was duly advertised and sold and struck off to the plaintiff as the highest bidder. The plaintiff afterwards applied to the defendant for liberty to bank, turf, and burn the kiln as it then stood, which liberty the defendant refused to grant. The plaintiff then demanded the lightwood, and proposed to bring his team and cart it off the defendant's land; whereupon the defendant replied, if the plaintiff came on his premises for that purpose, he would sue him. There was no evidence of an actual conversion, and at the time the suit was commenced, the kiln remained in the same situation in which it was when purchased by the plaintiff. The plaintiff was permitted to take a judgment for twenty pounds, the value of the kiln, with leave to the defendant to have the verdict set aside and a nonsuit entered, provided the court should be of opinion the plaintiff was not entitled to recover in this action, on the foregoing facts, and on motion of the defendant, the case was transmitted to this court for the opinion of the judges. On this case the court were divided in opinion.

HALL, J. The lightwood which is the subject-matter of this action was legally levied upon and sold to the plaintiff. That sale gave the plaintiff a title to it. The kiln of lightwood could not be delivered and carried away like most other kinds of personal property; it was sumbrous, and could only be removed in the manner proposed by the

¹ See *Towne v. Hazen*, 51 N. H. 596; *Hamilton v. Caldwell*, 23 N. Br. 373. — Ed.

plaintiff. If so, he had a right to remove it in that manner, and the defendant had no right to forbid him. Of course the plaintiff's right was not impaired by the defendant's threat to sue him if he entered upon his land and removed the lightwood; his physical power to do himself justice still remained. Had that been opposed, then there would have been a conversion. Had the defendant sued the plaintiff for carrying away the lightwood, he could not have recovered, because the plaintiff only did that which the law gave him a right to do, that was, to enter on the defendant's land and carry away property to which he had acquired a title by a purchase under an execution, property which could be removed in no other way. The threats which defendant made were of no legal significance, and ought to have been disregarded by the plaintiff. If the lightwood had been within the defendant's enclosures, and admittance had been denied, the case might have been different; but being in the woods, and no barrier interposed, the idle threat of defendant could not amount to a conversion, and the rule for a new trial, I think, ought to be made absolute.¹

LOWRIE, J., delivered the opinion of the majority of the court.²

The action of trover is the legal remedy to recover damages for the unlawful conversion of a personal chattel. The lightwood was a chattel of this description, and the purchase under the execution vested in the plaintiff a right to it. The lightwood, however, being bulky, and too cumbersome to be immediately moved from the defendant's land on which it was sold, the law will presume, unless by some express and unequivocal act of the debtor such presumption should be destroyed, that it was left there by his consent and in his possession until the necessary arrangement could be made for taking it away. In all cases where the consent of one man becomes necessary, and without which another cannot conveniently enjoy his property, the law presumes such consent to be given, unless the contrary expressly appears. Whenever, therefore, a man purchases heavy articles at a sheriff's sale, such as corn, fodder, hay-stacks, &c., which it is not presumable he is prepared immediately to take away, he may, if not prohibited by the debtor, return in a peaceable manner and lawfully enter upon the freehold, or into the enclosures of such debtor, or other person on whose land such articles were sold, for the purpose of taking them away. But in the present case such presumption ceased to exist the moment the defendant expressly prohibited the plaintiff from entering upon his freehold, and threatened him with a suit if he did enter. After such express prohibition the entry of the plaintiff could not be a peaceable and lawful one. The law will not permit one man to enter upon the possession of another for the assertion of a mere private right which he may have to an

¹ The concurring opinion of SEAWELL, J., is omitted — Ed.

² TAYLOR, C. J. LOCKE, LOWRIE, and HENDERSON, JJ.

article of personal property, against the express prohibition of him in possession; such permission would be attended with consequences very injurious to the peace of society. We therefore think that the refusal of the defendant, as stated in this case, was such evidence of a conversion as was proper to be left to a jury. The conduct of the defendant reduced the plaintiff to the necessity of asserting his right by an action at law. "If a man give leave to have trees put into his garden, and afterwards refuse to let the owner take them, it will be a conversion." *Com. Dig. Action on the Case, title Trover, E.* This case differs from that to be found in *Gilbert's Law of Evidence*, 262, and in 5 *Bac. Abr. Trover, B*, where there was a refusal to deliver a beam of timber; for here was not only a refusal to deliver, but a refusal to suffer the plaintiff to take the lightwood into his possession and cart it away, coupled with a declaration that, if the plaintiff entered upon his freehold for that purpose, he would sue him. The plaintiff was under no necessity to enter upon the defendant's land, and thereby incur the trouble and expense of a lawsuit. We therefore think the rule for a new trial should be discharged.

BRISTOL v. BURT.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1810.

[*Reported in 7 Johnson, 254.*]

THIS was an action of trover, brought to recover the value of ninety-five barrels of potashes. The cause was tried at the Onondaga circuit, the 7th June, 1810, before the Chief Justice.

The defendant was, in 1808, and still is, the collector of the port of Oswego, on the south side of Lake Ontario. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of Sackett's Harbor, which is the next adjoining port in the county of Jefferson, and on the south side of the lake, and adjacent to the province of Canada. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to Oswego, for the purpose of sending them to Sackett's Harbor. About the first July, the plaintiff sent ninety-five barrels of potashes to Oswego, which were put into the store of a Mr. Wentworth, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to Sackett's Harbor; but the defendant refused to grant it, alleging as a reason for his refusal that though he did not suspect the plaintiff intended to send the ashes to a British port, yet he believed that the collector at Sackett's Harbor would not do his duty, and that the ashes would be sent from thence to a British port. The defendant at the same time promised the plain-

tiff that if he did not receive instructions to the contrary from the Secretary of the Treasury, within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the Secretary of the Treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal than his suspicion that the collector at Sackett's Harbor would not do his duty, and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at Sackett's Harbor. The plaintiff then expressed his desire to take the ashes up the river; but the defendant declared that the plaintiff should not take them from Wentworth's store, unless he gave bonds for double the value of the property, to carry the ashes to Rome in the county of Oneida, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had a control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near Wentworth's store during two nights, and an armed sentinel was constantly on duty, night and day, at the public store of the collector, within ten rods of Wentworth's store, and in view of it, for the purpose of observing boats, and preventing the removal of property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in Oswego. The defendant demanded the ashes in question from Wentworth, who refused to deliver them; but, in order to prevent the defendant from proceeding to extremities, and to satisfy him, Wentworth entered into an agreement with the defendant not to deliver any property from his store, without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from Oswego up the river, and thirteen barrels of the potash of the plaintiff were delivered by Wentworth to his order.

On the 13th February, 1809, the defendant gave a written permit to carry the remaining eighty-two barrels of potashes from Oswego to Rome, in the county of Oneida, requiring of the person to whom they were delivered by order of the plaintiff a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved that, when the plaintiff applied to the defendant for a clearance to Sackett's Harbor, potashes were worth at that place 180 dollars per ton, and that the expense of transportation was 4 dollars per ton. That the price of potashes on the 21st July, 1808, in the city of New York, was 173 dollars per ton, but would not sell at Salina, in the county of Onondaga, for more than 150 dollars. That when the plaintiff received the ashes, the price of them, in the city of Albany, was 137 dollars and 50 cents, and the expense of transportation from 25 to 30 dollars per ton.

The Chief Justice charged the jury, that in his opinion there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover for the difference in the value of the ashes at the time when he demanded a clearance, and at the time he received them. And the jury found a verdict for the plaintiff for 1,472 dollars and 20 cents.

A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

Gold, for the plaintiff, cited 6 East, 538 ; 6 Term Rep. 298 ; 1 Burr. 81.

Cady, contra, cited 5 Bac. Abr. 279, Trover (G) ; Bull. N. P. 44 ; 3 Salk. 284.

Per Curiam. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord Holt, in *Baldwin v. Cole*, is a conversion ; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods ? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorp's Case* (cited in 2 Bulst. 310, 314), where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no act done or dominion exercised ; but in the present case there were the highest and most unequivocal acts of dominion and control over the property, not only by claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was therefore bringing a charge upon the plaintiff ; and this, says Mr. Justice Buller, in *Syeds v. Hay*,¹ amounts to a conversion. Neither the case of *M'Combie v. Davies*, nor the anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord Ellenborough the test of the conversion, though the property in that case lay not in the defendant's but in the king's warehouse. The definition of a conversion in trover, as given by Mr. Gwillim, the editor of Bacon, and now a judge in India, applies precisely to this case. 6 Bac. Abr. 677. "The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives or is inconsistent with such right, amounts in law to a conversion.

¹ 4 T. R. 260.

It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion that the motion to set aside the verdict must be denied. *Motion denied.*¹

ENGLAND v. COWLEY.

IN THE EXCHEQUER, JANUARY 16, 1878.

[*Reported in Law Reports, 8 Exchequer, 126.*]

TROVER for household furniture. Plea: Not guilty by statute (11 Geo. II. c. 19, § 21). Issue.

The plaintiff was the holder of a bill of sale over the household furniture of Miss Morley, the tenant to the defendant of a house in River Terrace, Chelsea. The bill of sale contained the usual clauses enabling the plaintiff to take possession of and remove and sell the furniture in case of default upon Miss Morley's part in payment of the sum advanced. She having made default, the plaintiff put a man in possession early in August, 1872, and upon the 11th of August sent two of his men with vans to remove the furniture from the house. It was then after sunset. The men were met at the house by the defendant, the landlord, who alleged that half a year's rent was due and in arrear, and stated that he did not intend to allow the goods to be removed, as he meant to distrain on the day following.

¹ Chapman v. Allen, Cro. Car. 271; Brennan v. Currant, Sayer, 224; Dewell v. Moxon, 1 Taunt. 391; Pattison v. Robinson, 5 M. & Sel. 105; Wilton v. Girdlestone, 5 B. & Ald. 847; Sharp v. Pratt, 3 C. & P. 84; Clendon v. Dinneford, 5 C. & P. 13; Cranch v. White, 1 B. N. C. 414; Wansbrough v. Maton, 4 A. & E. 884; Sylvester v. Craig, 18 Colo. 44; Hughes v. Coors, 3 Colo. Ap. 303; Thompson v. Rose, 16 Conn. 71; Clark v. Hale, 34 Conn. 398; Maxwell v. Harrison, 8 Ga. 67; Hale v. Barrett, 26 Ill. 195; Ring v. Billings, 51 Ill. 475; Hipple v. De Puie, 51 Ill. 523; Nor. Trans. Co. v. Sellick, 52 Ill. 249; Pullen v. Bell, 40 Me. 314; Neal v. Hanson, 60 Me. 84; Buel v. Pumphrey, 2 Md. 261; Chamberlin v. Shaw, 18 Pick. 278; Magee v. Scott, 9 Cush. 148; Folsom v. Manchester, 11 Cush. 334; Boston Acid Manuf. Co. v. Moring, 15 Gray, 211; Hinckley v. Baxter, 13 All. 139; Cox v. Cook, 14 All. 165; Bates v. Stansell, 19 Mich. 91; O'Donoghue v. Corby, 22 Mo. 393; Huxley v. Hartzell, 44 Mo. 370; Bradley v. Spofford, 23 N. H. 444; Dunlap v. Hunting, 2 Den. 643; Farrar v. Chauffetete, 5 Den. 537; Hall v. Robinson, 2 N. Y. 293; Tuttle v. Gladding, 2 E. D. Smith, 157; Solomon v. Waas, 2 Hilt. 179; Chambers v. Lewis, 28 N. Y. 454; Hare v. Pearson, 4 Ired. 76; McDaniel v. Nethercut, 8 Jones, 97; Berry v. Vantrien, 13 Serj. & R. 89; Harger v. M'Mains, 4 Watts, 418; Ratcliff v. Vance, 2 Mill's Const. R. 239; Fowler v. Stuart, 1 McCord, 504; Trowell v. Youmanes, 5 Strobh. 67; Roach v. Damron, 2 Humph. 425; Irish v. Cloyes, 8 Vt. 30; Albee v. Cole, 39 Vt. 319; Leonard v. Belknap, 47 Vt. 602; Vilas v. Mason, 25 Wis. 310 *Accord.* — ED.

One of the men returned and informed the plaintiff of what had passed. The plaintiff thereupon went to the house himself, and was told by the defendant, who was in the passage, that he would not suffer any of the goods to be taken away until his rent was paid. The defendant had also engaged a policeman, whom he stationed outside, to prevent the removal of the goods. The plaintiff thereupon gave up the attempted removal and went away, leaving a man still in possession. The defendant did not himself actually take possession of or remove any of the goods upon this occasion. His object was to prevent the plaintiff's removing them, in order to distrain the next day at a legal hour.

The cause was tried before Bramwell, B., at the Surrey summer assizes, 1872. In summing up, the learned judge directed the jury in the following terms: "If you are of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing him to remain in possession of them if he liked, then there is no cause of action." The jury answered this question in favor of the defendant, and a verdict was entered for him accordingly, with leave to enter a verdict for the plaintiff for £40, the value of the goods, if the court should be of opinion that the learned judge ought to have directed a verdict for the plaintiff. A rule was obtained in Michaelmas term accordingly, on the ground that the learned judge ought to have directed the jury that the conversion was proved.

Holl showed cause.

Joyce, in support of the rule.¹

POLLOCK, B. I am of opinion that this rule should be discharged. The defendant was never in possession of the goods. No doubt cases might be put where a wrong-doer, though not in actual possession, uses such force or contrivance as to interfere entirely with the dominion of the true owner; but here there was a mere assertion of right on the defendant's part. I think the plaintiff should have insisted upon removing the goods, if he intended afterwards to challenge the defendant's assertion in an action of trover. It is a sound rule of law which is laid down in *Co. Litt.* 253 *b*, where continual claim is treated of, that it is not every cause of fear which can excuse a person from not claiming his rights. The fear must not be a "vain feare." It must be "some just cause of feare." Now in this case the plaintiff proved no act of interference, but only a threat, which the plaintiff, if he meant afterwards to stand by his rights, ought to have resisted. Mr. Joyce has urged that the defendant detained the plaintiff's goods; but in fact he never had them to detain. He merely said, "You shall not remove them." That is not enough to furnish ground for this action.

¹ The arguments of counsel are omitted. — ED.

BRAMWELL, B. I am of the same opinion. I think no action is maintainable, because the defendant did not act, but only threatened that, in a certain event, he would do something. The plaintiff should either have proceeded with the removal of the goods, or at least have commenced to remove them, leaving the defendant to stop him at his peril, when there might have been a cause of action of some sort. But, further, even if the defendant had prevented the removal of the goods by physical force, I do not think trover would have been maintainable. The substance of that action is the same as before the Common-law Procedure Act, 1852, and although, in the form of declaration there given in sch. B, the words used are, "converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods," the gist of the action is the conversion, as for example, by consuming the goods, or by refusing the true owner possession, the wrong-doer having himself at the time a physical control over the goods. Now here the defendant did not "convert" the goods to his own use, either by sale or in any other way. Nor did he deprive the plaintiff of them. All he did was to prevent, or threaten to prevent, the plaintiff from using them in a particular way. "You shall not remove them," he said, but the plaintiff still might do as he pleased with them in the house. Assume that there was actual prevention, still I think this action cannot be maintained. Take some analogous cases by way of illustration. A man is going to fight a duel, and goes to a drawer to get one of his pistols. I say to him, "You shall not take that pistol of yours out of the drawer," and hinder his doing so. Is that a conversion of the pistol by me to my own use? Certainly not. Or, again, I meet a man on horseback going in a particular direction, and say to him, "You shall not go that way, you must turn back;" and make him comply. Who could say that I had been guilty of a conversion of the horse? Or I might prevent a man from pawning his watch, but no one would call that a conversion of the watch by me. And really this case is the same with these. Illustrations of my meaning might be easily multiplied. The truth is, that, in order to maintain trover, a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by the plaintiff; he must say that nothing shall. Now here there was no interference with the plaintiff's rights, except the statement by the defendant that he would prevent the goods from being removed. This is not sufficient to furnish a basis for the present action. For it must be remembered that if the defendant is liable at all, it is for the value of the goods. But how unjust that would be! The plaintiff's man was left in possession. Miss Morley could not legally take away the goods. If she did, the plaintiff could maintain an action against her for their wrongful removal. Yet he is also to be able to recover

their full value against the defendant. Moreover, I cannot but think that the jury really negatived all idea of conversion. "If you are of opinion," they were told, "that the defendant did not deprive the plaintiff of his goods, did not take possession of nor assume dominion over them, but merely prevented the plaintiff from removing them from one place to another, allowing the plaintiff to remain in possession of them if he liked," then there is no cause of action. The jury answered this question in favor of the defendant. There had, therefore, been no general assertion of right to the exclusion of the plaintiff.

MARTIN, B. I think this rule should be made absolute. The real question is whether the defendant "converted to his own use, or wrongfully deprived" the plaintiff of his goods. Now it appears that the plaintiff had a bill of sale over the goods of one Morley, whose landlord the defendant was. After sunset on the 11th of August, 1827, when a distress was impossible, the plaintiff, who had previously put a man in possession, went himself to the house with the view of removing the goods, there having been a default under the bill of sale. The defendant could not distrain that evening, but, in order to have the opportunity of distraining, he told the plaintiff he would prevent the goods being removed, and he took steps accordingly, placing a policeman to watch the house and to prevent the removal. I think this was a conversion. The plaintiff was not bound to resist the defendant, and to remove his goods at the peril of coming into collision with him. He was deprived, by the plaintiff's act, of the power over his goods which he was entitled to exercise. That is, in my opinion, enough to enable him to maintain this action. If the defendant had been in the room where the goods were, and had said to the plaintiff, "These goods shall not be removed," surely that would have been a "wrongful deprivation." The defendant was, in fact, not in the room but in the passage, with equal means, however, of stopping the removal. I can see no difference between the two cases.

KELLY, C. B. I am of opinion that this rule should be discharged. The defendant, in my judgment, never converted these goods to his own use. The plaintiff was himself in actual possession of them, and all the defendant did was to say, "Rent is due to me, and before that rent is paid I will not allow these goods to be removed." This is no conversion. Many illustrations might be put to show how absurd would be the consequences of so holding. For instance, suppose a lodger was ill, and an attempt were made to remove the bed he was lying on. Some one interferes, and says to the man who wants to remove, and who is the true owner, "You shall not do so." This is an interference with his dominion over his own property; yet there would be no conversion. Indeed, it is only by relying upon the somewhat vague language which has been used about this form of action that any plausible argument can be maintained. Apart from

mere *dicta*, no case, so far as I am aware, can be found where a man not in possession of the property has been held liable in trover unless he has absolutely denied the plaintiff's right, although, if in possession of the property, any dealing with it, inconsistent with the true owner's right, would be a conversion. A limited interference with the plaintiff's property, where all along the plaintiff is himself in possession, does not constitute conversion. In the case of *Fowler v. Hollins*, the cotton was in the defendant's actual possession. I thought him not guilty because he was acting as broker merely; but even assuming the case was well decided, the plaintiff was out of possession, and the defendant had full control over the goods. So also in *Wilbraham v. Snow*,¹ the plaintiff's tools were entirely under the control of the defendant. Nor does the case referred to by my Brother Martin, of *Fouldes v. Willoughby*, really assist the plaintiff; for the *dictum* of Alderson, B., which at first sight appears to favor his contention, is founded upon the assumption that the plaintiff was out of actual possession of the goods.

I think, therefore, that the plaintiff must fail in this form of action. He may have another remedy by some form of action of trespass on the case, but the measure of damages would be different. It would be unjust that, under the circumstances proved, he should recover against the defendant the value of the goods. The rule must, therefore, be discharged.

*Rule discharged.*²

HIORT v. BOTT.

IN THE EXCHEQUER, FEBRUARY 12, 1874.

[Reported in *Law Reports*, 9 *Exchequer*, 86.]

ACTION of trover for barley, tried before Archibald, J., at the Staffordshire summer assizes, 1873.

The facts were as follows: The plaintiffs, who were corn merchants, trading under the name of Brochner & Co., at Hull, had been in the habit of employing one Grimmett as their broker. In consequence of a telegram from Grimmett, they, on the 8th of June, 1872, forwarded to the London and North-western Railway station at Birmingham eighty-three quarters of barley, and at the same time sent to the defendant, who was a licensed victualler carrying on business at Deritend, Birmingham, a letter, inclosing an invoice for the barley, in which it was stated to be "sold by Mr. Grimmett as broker between buyer and seller," and a delivery order, which made the barley deliverable "to

¹ 2 Notes to Saund. by Wms. 37.

² *Boobier v. Boobier*, 39 Me. 406; *Polley v. Lenox Iron Works*, 2 All. 184; *Platner v. Johnson*, 26 Miss. 142 *Acord*.

Compare *Guthrie v. Jones*, 108 Mass. 191; *Crockett v. Beaty*, 8 Humph. 20. — ED.

the order of consignor or consignee." The barley had, in fact, never been ordered by the defendant, who had had no previous dealings with either the plaintiffs or Grimmatt. A day or two after the receipt of these documents by the defendant, Grimmatt called; the defendant produced the documents, and said, "What does this mean? I never bought any barley through you of Brochner & Co." Grimmatt said, "It was a mistake of Brochner & Co.; they had, no doubt, confused the defendant's name and some other name; they were doing a large business, and might have made a mistake." Grimmatt then asked the defendant to indorse the order, telling him that he could not get the barley without, and that by not sending the order back expense would be saved. Thereupon the defendant indorsed the delivery order to Grimmatt, who took it to the railway station, obtained delivery of the barley, disposed of it, and absconded.

In answer to a question by the learned judge, the jury found that the defendant, in signing the order, had no intention of appropriating the barley to his own use, but was anxious to correct what he believed to be an error; and, on the learned judge adding, "and with a view of returning the barley to the plaintiffs," they assented.

The learned judge then directed the verdict to be entered for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £180, the value of the barley. A rule having been obtained accordingly,

Feb. 10. *Jelf* (Powell, Q. C., with him), showed cause.

Bosanquet (Huddleston, Q. C., with him), in support of the rule.¹

Cur. adv. vult.

Feb. 12. The following judgments were delivered:—

BRAMWELL, B. This case was argued before my brothers Pigott and Cleasby and myself, and we are all of opinion that the rule must be made absolute.

I think the plaintiffs are entitled to recover; though, so far as concerns the defendant, whose act was well meant, I regret the result. Mr. Bosanquet gave a good description of what constitutes a conversion when he said that it is where a man does an unauthorized act which deprives another of his property permanently or for an indefinite time. The expression used in the declaration is "converted to his own use;" but that does not mean that the defendant consumed the goods himself; for if a man gave a quantity of another person's wine to a friend to drink, and the friend drank it, that would no doubt be as much a conversion of the wine as if he drank it himself. Now here the defendant did an act that was unauthorized. There was no occasion for him to do it; for the delivery order made the barley deliverable to the order of the consignor or consignee, and if the defendant had done nothing at all it would have been delivered to the plaintiffs. And

¹ The arguments of counsel and the concurring opinion of CLEASBY, B., are omitted. — ED.

there is no doubt that by what he did he deprived the plaintiffs of their property; because, by means of this order so indorsed, Grimmett got the barley and made away with it, leaving the plaintiffs without any remedy against the railway company, who had acted according to the instructions of the plaintiffs in delivering the barley to the order of the consignee. The case, therefore, stands thus, that by an unauthorized act on the part of the defendant the plaintiffs have lost their barley, without any remedy except against Grimmett, and that is worthless. It seems to me, therefore, that this was assuming a control over the disposition of these goods, and a causing them to be delivered to a person who deprived the plaintiffs of them. The conversion is therefore made out.

Various ingenious cases were put as to what would happen if, for instance, a parcel were left at your house by mistake, and you gave it to your servant to take back to the person who left it there, and the servant misappropriated it. Probably the safest way of dealing with that case is to wait until it arises; but I may observe that there is this difference between such a case and the present one, that where a man delivers a parcel to you by mistake, it is contemplated that if there is a mistake, you will do something with it. What are you to do with it? Warehouse it? No. Are you to turn it into the street? That would be an unreasonable thing to do. Does he not impliedly authorize you to take reasonable steps with regard to it, — that is, to send it back by a trustworthy person? And when you say, "Go and deliver it to the person who sent it," are you in any manner converting it to your own use? That may be a question. But here the defendant did not send the order back; but at Grimmett's request indorsed it to him, though, no doubt, as the jury have found, with a view to the barley being returned to the plaintiffs. There is, therefore, a distinction between the case put and the present one. And there is also a distinction between the case of *Heugh v. London and North-western Ry. Co.*,¹ which was cited for the defendant, and the present case; because there it was taken that the plaintiff authorized the defendants to deliver the goods to a person applying for them, if they had reasonable grounds for believing him to be the right person.

On these considerations I think the plaintiffs are entitled to recover. But I must add one word. This is an action for conversion, and I lament that such a word should appear in our proceedings, which does not represent the real facts, and which always gives rise to a discussion as to what is, and what is not, a conversion. But supposing the case were stated according to a non-artificial system of pleading, thus: "We, the plaintiffs, had at the London and North-western Railway station certain barley. We had sent the delivery order to you, the defendant. You might have got it, if you were minded to be the buyer of it; you were not so minded, and therefore should have done nothing

¹ L. R. 5 Ex. 51.

with it. Nevertheless, you ordered the London and North-western Railway Company to deliver it, without any authority, to Grimmer, who took it away." Would not that have been a logical and precise statement of a tortious act on the part of the defendant, causing loss to the plaintiffs? It seems to me that it would. I think, but not without some regret, that this rule should be made absolute, to enter the verdict for the plaintiffs. *Rule absolute.*¹

¹ Hawkes v. Dunn, 1 Cr. & J. 519; Hoare v. Great West. Co., 37 L. T. Rep. 186; Stewart v. Frazier, 5 Ala. 114; Lichtenstein v. Boston Co., 11 Cush. 70; Hall v. Boston Co., 14 All. 439; Fitzgerald v. Burrill, 106 Mass. 446; Jenkins v. Bacon, 111 Mass. 373; Kowing v. Manley, 49 N. Y. 192 *Accord*. See Purcell v. Jaycox, 3 Th. & C. 406. — Ed.

SECTION II. (*continued.*)

(h) DEMAND AND REFUSAL.

BALDWIN v. COLE.

AT NISI PRIUS, CORAM LORD HOLT, C. J., 1704.

[*Reported in 6 Modern Reports, 212.*]

TROVER. The case, upon evidence, was this:—

A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

HOLT, C. J. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden;¹ for what is a conversion but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them; so the taking and carrying away another man's goods is a conversion; so if one come into my close, and take my horse and ride him, there it is conversion; and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages; and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service and brought his own horse, that the property thereof was immediately altered and vested in the queen; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found not guilty as to that, and guilty as to the rest.²

¹ On a special verdict, finding only a demand and refusal, the court would not give judgment for the plaintiff. *Chancellor's Case*, 10 Rep. 56 *b*; *Isaac v. Clark*, 2 Bulst. 308; *Mires v. Solebay*, 2 Mod. 242; *Morris v. Pugh*, 3 Burr. 1243; *Cutter v. Fanning*, 2 Iowa, 580; *Daggett v. Davis*, 53 Mich. 35; *Hill v. Covell*, 1 N. Y. 522. But see *Eason v. Newman*, Cro. El. 495. — ED.

² *Watkins v. Woolley*, Gow, 69; *Davies v. Nicholas*, 7 C. & P. 339; *McCormick v. Pennsylvania Co.*, 49 N. Y. 303, 80 N. Y. 353, 99 N. Y. 65; *Montanye v. Montgomery*, 19 N. Y. Sup. 655; *Smith v. Durham*, 127 N. Ca. 417; *Doherty v. Madgett*, 58 Vt. 323 *Accord*.

A demand of satisfaction for a chattel is regarded as a demand for the chattel. *Rookeby's Case*, Clayt. 122; *Thompson v. Shirley*, 1 Esp. 31; *La Place v. Aupoix*, 1 Johns. Cas. 406. — ED.

BOARDMAN v. SILL.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS
AFTER MICHAELMAS TERM, 1809.

[Reported in 1 Campbell, 410.]

TROVER for some brandy, which lay in the defendant's cellars, and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to the defendant on account of the brandy, of which no tender had been made to him. The *Attorney-General* contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered trover would not lie. But LORD ELLENBOROUGH considered that, as the brandy had been detained on a different ground, and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt.

*The plaintiff had a verdict.*¹

BURROUGHES v. BAYNE.

IN THE EXCHEQUER, FEBRUARY 10, 1860.

[Reported in 5 Hurlstone & Norman, 296.]

TROVER for a billiard table with the appurtenances. Pleas: first, not guilty; secondly, that the goods were not the plaintiff's. Whereupon issue was joined.

At the trial before Bramwell, B., at the sittings in London after Trinity term, it appeared that, in July, 1857, the billiard table in ques-

¹ Knight v. Harrison, Saunders's Pl. & Ev. 641; Boardman v. Sill, 1 Camp. 410; Wilson v. Anderton, 1 B. & Ad. 750; Thompson v. Trail, 6 B. & C. 36; Dirks v. Richards, 4 M. & Gr. 574; Counce v. Spanton, 7 M. & Gr. 903; Catterall v. Kenyon, 3 Q. B. 310; Jones v. Tarleton, 9 M. & W. 675; Lee v. Bayes, 18 C. B. 599; Weeks v. Goode, 6 C. B. N. S. 367; Hinckley v. Baxter, 13 All. 139; Doty v. Hawkins, 6 N. H. 247; Clark v. Rideout, 39 N. H. 238; Wykoff v. Stevenson, 46 N. J. 326; Judah v. Kemp, 2 Johns. Cas. 411; Everett v. Saltus, 15 Wend. 474; Saltus v. Everett, 20 Wend. 267; Holbrook v. Wight, 24 Wend. 169; Rogers v. Weir, 34 N. Y. 463; Ball v. Liney, 48 N. Y. 6; Carroll v. Mix, 51 Barb. 212; Dowd v. Wadsworth, 2 Dev. 130; Buckley v. Handy, 2 Miles, 449; Jacoby v. Lamsatt, 6 S. & R. 300; Wagenblast v. M'Kean, 2 Grant, 393; Andrews v. Wade, 6 Atl. R. 48; Williams v. Smith, 153 Pa. 462; Bean v. Bolton, 3 Phila. 87, 93; Singer Co. v. King, 14 R. I. 511; West v. Tupper, 1 Bail. 198 Accord.

Compare Scarfe v. Morgan, 4 M. & W. 270; White v. Gainer, 1 C. & P. 324; s. c. 2 Bing. 23; Spence v. McMillan, 10 Ala. 583; Thompson v. Rose, 16 Conn. 85; Hanna v. Phelps, 7 Ind. 21; Dows v. Morewood, 10 Barb. 183. — Ed.

tion had been hired of the plaintiff by one Filmer, who kept a hotel in Harley Street, Cavendish Square.

The table remained in Filmer's possession till the 7th of March, 1859, when a further agreement was drawn up, indorsed on the first agreement, and executed by Filmer.

This agreement was never completed. At the beginning of April the plaintiff demanded the billiard table of Filmer, when he found that a bill of sale had been executed by Filmer to the defendant, under which the defendant's man was in possession of the goods in Filmer's house. The billiard table was included in the bill of sale. On the 13th of April a clerk of the plaintiff's attorney served on the defendant at his house in Brook Street, a formal demand of the billiard table. The defendant asked to see the agreement, which the plaintiff's son accordingly produced to him on the next day. The defendant then asked for a copy, that he might consult his attorney, but the plaintiff would not allow a copy to be taken. The plaintiff's son deposed that the defendant seemed at first willing to give up the table, but afterwards, on reading the two agreements, said, "If it was a hiring only, he would give up the table, but it appeared to be a purchase. The table was in the inventory, and, unless the plaintiff could prove that it was his, he would stick to it." The plaintiff then caused notices to be served on the defendant and the man in possession that on the following morning, the 15th of April, at twelve o'clock, he would call to fetch away the table. The plaintiff and his men called on the next day at Filmer's house in Harley Street at the time appointed and saw the man in possession, but could not obtain the billiard table, the door of the billiard-room being locked. The plaintiff never got the billiard table, which was ultimately seized and sold by the landlord under a distress for rent. The defendant swore that on the morning of the day last mentioned he had given instructions to the man in possession not to detain the table. The man in possession said that he told the plaintiff that he might have the table, but he could not find the key of the room in which it was. The jury found a verdict for the plaintiff.

Petersdorff, Serjt., in Michaelmas term, obtained a rule for a new trial, on the ground that there was no evidence of a conversion, and that the verdict was against the evidence.

C. E. Pollock showed cause (February 9).

Petersdorff, Serjt., in support of the rule.¹

Cur. adv. vult.

The following judgments were now pronounced :—

MARTIN, B. The question in this case was, whether there was evidence to go to the jury of a conversion; and we are all of opinion that there was. The case, as it seems to me, is of considerable importance. There is no more common cause of action than where an owner of goods complains that another has wrongfully taken possession of them. The law has provided four forms of action applicable to such a state of

¹ The arguments of counsel and the opinion of CHANNELL, B., who agreed with MARTIN, B., are omitted. — Ed.

things. First, the action of trespass, which appears more immediately directed to the taking of a man's property out of the possession of the owner; secondly, the action of replevin in respect of goods taken but restored to the owner by process of law. But at common law the more direct remedy for the recovery of possession, or damages, where a chattel was detained from the owner, was the action of detinue. There existed, however, an objection to that action, which was that the defendant was entitled to wage his law; and the consequence was that the defendant in an action of detinue, by himself swearing to the non-existence of the cause of action, could at once defeat the plaintiff. In consequence of this, the courts of law in very early times invented the action of trover. They permitted the plaintiff to state that he lost goods which he never lost, and that the defendant found goods which he never found, and that the defendant converted the goods so found to his own use. The courts took upon themselves to prohibit the defendant from denying either the averment of the losing or the finding by the defendant; and thus they gave an action (a species of action on the case) in which the defendant could not wage his law. That, I believe, was the origin of the action of trover, — an action devised for the purpose of preventing the plaintiffs from being defeated by the wager of law. The origin of the action of *indebitatus assumpsit* was the same. For the purpose of preventing the wager of law in an action to recover a debt, the courts devised the action of *indebitatus assumpsit*, wherein it was alleged that the defendant was indebted to the plaintiff, and, being so indebted, he promised to pay the debt, but broke his promise. This was an action on the case, and wager of law could not be made. This, I believe, was the true origin of the action of trover, and, in my judgment, we ought to extend its operation to all cases where a right of action in detinue properly exists, and not throw difficulties in the way of a man's recovering where his goods are wrongfully detained. I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words "trover" or "conversion;" they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word "conversion" is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion in one sense has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person, not a lawyer, might possibly understand the term. In ordinary cases, the plaintiff's proof is much the same as would be required in an action of detinue. But the word "conversion," by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them. In

*Wilbraham v. Snow*¹ there is a note of Serjeant Williams, which, I apprehend, is as good an authority on this subject as exists. He says: "So where a carpenter, who worked in the king's yard, refused to go there any more, upon which the surveyor would not let him have his tools until the king's work was done, under a pretended usage to do so, a demand and refusal being proved, it was held, by Holt, C. J., that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another's goods? And whoever detains another man's goods from him without cause takes upon himself the right of disposing of them." Now I adopt that as the true meaning of the word "conversion," in reference to this action, and the same rule has been laid down in modern times. There is a case, *Fouldes v. Willoughby*, which I have long considered, and often heard cited as laying down the true rule upon this subject. In that case a ferryman at Birkenhead had had some horses put on board his boat to bring to Liverpool; he turned them out, and the horses were left upon the road. An action of trover was brought, and the question was, whether or not trover lay for their value. The court were of opinion that it did not; and the distinction between the action of trespass and trover was much discussed. Alderson, B., in delivering his judgment, says: "Any asportation of a chattel for the use of the defendant or a third person amounts to a conversion, for this simple reason: that it is an act inconsistent with the general right of dominion which the owner of the chattel has in it, who is entitled to the use of it at all times, and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion." I entirely accede to this view of the law, which is simple and of easy application.

Apply it to this case. The facts were these: A person had hired a billiard table of the plaintiff, and then had executed a bill of sale to the defendant; and I own that I am not prepared to state that the taking possession under that bill of sale was not an act of conversion, for it seems to me it falls within what is stated by Alderson, B., that it is an act by which the defendant took possession of the chattel for the use of himself from a person who had no right to give it. I am by no means inclined to say that the simple taking possession by the defendant under the bill of sale was not a conversion of those goods. What further took place, however, is this: The plaintiff went to the defendant and showed him the document under which the billiard table was hired. Thereupon the defendant said he would give it up; but, on turning over the paper, he found something which was an incomplete contract for sale, and he then alleged that there was a sale, or that he supposed there was, and refused to give it up. He said, in effect, "You are not entitled to it," and he did not deliver it up. In the

¹ 2 Wms. Saund. 47 g.

evening the plaintiff told the defendant that at twelve o'clock on the following day he should send for the table for the purpose of carrying it away. Accordingly the plaintiff did send, and could not get it, it being locked up. In the mean time the defendant had found that he was in error, and had directed the man in possession to give up the billiard table. If the key could have been obtained, it is suggested that it would have been given up. The plaintiff, however, went to get the billiard table in pursuance of his notice; and I think it was the duty of the defendant to be ready to give it to him when he came for it. The consequence was that the billiard table was distrained by the landlord for rent. If it had been delivered up to the plaintiff on the day appointed, when he was entitled to have it, this would not have happened. I think that this was evidence to go to the jury of a conversion. I myself should have directed the jury to find a verdict for the plaintiff, if they believed the evidence adduced on his behalf. For these reasons, I think the rule ought to be discharged.

BRAMWELL, B. I think, if anything was necessary to show the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term "conversion." It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. As to this particular case, I think there was no misdirection; certainly, in a technical sense, there was not; because, if the plaintiff's account is true, there was evidence of a conversion, — he demanded the goods, and could not get them. But, I think, if the jury acted upon that, they acted upon erroneous evidence, and that they ought to have acted on the evidence of the defendant; and, therefore, if my learned brothers had taken the same view of the evidence as I do, I should have thought a new trial ought to have been granted. But I protest against the notion that, because the judge who tried the cause says he is dissatisfied with the verdict, therefore a new trial should be granted. That ought not to be unless there are reasonable grounds for that dissatisfaction. Inasmuch as I have not been able to persuade my brothers that my grounds are reasonable, I think that they are right in discharging the rule. But I confess I think the verdict was against the evidence. I cannot say there was not evidence to go to the jury of a conversion of the goods, but I think the verdict was against the evidence. It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. Parke, B., in *Clark v. Chamberlain*,¹ said: "If, instead of insisting upon salvage being paid, the defendant had said, 'I do not know whether salvage is due or not; I shall keep them until that is ascertained,' he would not have been guilty of a conversion." In such cases, it would be monstrous to

¹ 2 M. & W. 78.

hold that a man had not a right to make reasonable inquiries. It cannot be that, if I pick up a watch in the street, and another person says, "that is mine," I am bound at once to deliver it up. I may say, "It may be, but I will not give it to you before you tell me the name of the maker;" and, if he thereupon walked away, it cannot be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it; but I do not believe it is. The result is, you must in all cases look to see, not whether there has been what may be called a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some cases of a simple wrongful withholding, which may, according to the construction put upon that word, be called a conversion to a man's own use; because, what matters it, to one who may be the owner of the goods, how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it. He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-room, and does nothing to it but let it hang there: that is, to all intents and purposes, a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire to a person who had lawful possession of it, and who might hand it over to the defendant without the defendant being a trespasser or wrong-doer therein. There was no suggestion that he got possession of it wrongfully; but, having got possession of it lawfully, and never having removed it from the place where it was originally placed, and, in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Show me how it is yours; bring the contract of hiring." The contract of hiring is brought; the defendant sees a writing on the back of it, which tends to show it was a sale; and then asks for a copy, in order that he may take advice upon it; the plaintiff, instead of doing as he properly might have done according to my view, says: "I shall not; the table is mine; you may give it to me or not; but I shall treat it as a refusal." It turns out that he himself put the true color on the transaction, by sending a formal notice, and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened that the defendant had given up the nominal possession; and the person who had the actual custody had locked up the room, and the plaintiff could not get the table; he went away, and five or six days afterwards the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion of the table to the

defendant's own use. An attempt was made by my Brother Martin to render this word "conversion" intelligible. But it ought to be borne in mind that in the forms of pleading given in the appendix to the Common-law Procedure Act of 1852 (the 15 & 16 Vict. c. 76), this is the form of the count in trover: "That the defendant converted to his own use, or wrongfully deprived the plaintiff of the use and possession of the plaintiff's goods, that is to say," &c. So that the Legislature has put a meaning on the word "conversion." If the complaint had been that the defendant wrongfully deprived the plaintiff of the use and possession of his goods, the answer might well be, "I did not continue to detain them; you might have had them, but you would not wait. If I am to be considered as having wrongfully detained them, though you went away and sent for them the next morning, your damages are a farthing." Instead of which, by the use of the word "conversion," the defendant is made liable for the value of the billiard table, which he cannot recover from anybody else. Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was matter of discussion up to the time when the plaintiff was informed the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion. For these reasons I think that the verdict was against the evidence; but, in so saying, I desire to add that in my opinion it is not merely because the judge who tried the cause comes to a different conclusion from the jury upon the facts, that a new trial should be granted; but that where it appears to the court that the view taken by the judge is wrong he should be set right, as on the present occasion, by being overruled.

*Rule discharged.*¹

GREEN v. DUNN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., SITTINGS
AFTER MICHAELMAS TERM, 1811.

[*Reported in 3 Campbell, 215.*]

TROVER for timber, which defendant found on his premises, and which had been deposited there by the permission of the servant of the former occupier.

The plaintiff, to whom the timber belonged, having demanded it of

¹ See *Fothergill v. Lovegrove*, 2 F. & F. 132; *Cox v. Cook*, 14 All. 165; *Cargill v. Webb*, 10 N. H. 199; *Durell v. Mosher*, 8 John. 445; *Mitchell v. Williams*, 4 Hill, 13; and compare *Towne v. Lewis*, 7 C. B. 608. — ED.

the defendant, the latter said, "If you will bring any one to prove it is your property, I will give it you, and not else."

LORD ELLENBOROUGH. This is a qualified refusal, and no evidence of conversion. *Plaintiff nonsuited.*¹

ALEXANDER v. SOUTHEY.

IN THE KING'S BENCH, NOVEMBER 14, 1821.

[Reported in 5 Barnewall & Alderson, 247.]

TROVER for printing-types and other goods. Plea: General issue. At the trial, at the last Guildhall sittings, before Best, J., it appeared that the defendant, who was the servant of the Albion Insurance Company, had in his custody in a warehouse, of which he kept the key, certain goods belonging to the plaintiff, saved from a fire at the plaintiff's house, and which had been carried to the warehouse by the servants of the company. The only evidence of a conversion was that, when the plaintiff demanded the goods from the defendant, the latter said that he could not deliver them up without an order from the Albion office. The learned judge left it to the jury to say whether this qualification of the defendant's refusal was a reasonable one, telling them that, if so, he was of opinion that there was not sufficient evidence of a conversion. The jury, accordingly, found a verdict for the defendant. And now

Denman moved for a new trial, on the ground of a misdirection.²

ABBOTT, C. J. I am of opinion that in this case there should be no rule. *Perkins v. Smith* and *Stephens v. Elwall* were both cases of actual conversion by servants, in disposing of goods the property of others, to their master's use; but here the question is whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned judge was right in so considering it, and in directing the jury to find a verdict for the defendant.

BATLEY, J. If the plaintiff in this case had informed the defendant that he had previously made application to the insurance company, and that they had refused permission for the delivery of the property, or had told the defendant that he expected him to go and get an order authorizing the delivery of the property, and after that the defendant

¹ *Solomons v. Dawes*, 1 Esp. 83; *Gunton v. Nurse*, 2 B. & B. 447; *Robinson v. Barleigh*, 5 N. H. 225; *Jacoby v. Laussatt*, 6 S. & R. 300 (*semble*); *Singer Co. v. King*, 14 R. L. 511 *Accord*.

Compare *Connah v. Hale*, 23 Wend. 471. — Ed.

² The argument for the plaintiff is omitted. — Ed.

had refused either to deliver the goods or to go and get such order, I think it would have amounted to a conversion on his part; but here the defendant had the goods in his possession as the agent of the insurance company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable, and justifiable refusal.

HOLROYD, J. I think the verdict in this case was right. In point of law, the goods were only in the custody of the defendant, and in the possession of his employers, the insurance company. If we were to hold this refusal to be a conversion, it would go this length, that if a person were to call at a gentleman's house, and to ask his servant to deliver goods to him, and the servant were to refuse to do so, unless a previous application was made to his master, it would amount to a conversion on the part of the servant. In this case the goods came into the defendant's possession lawfully; and the refusal is only till an order is obtained from the defendant's employers. In *Perkins v. Smith*, the defendant received the goods wrongfully at first, and the conversion was by an actual sale of them. Now, it is clear that the authority of the master would not amount to a defence of that which was altogether a tortious act of the servant. The case of *Mires v. Solebay*¹ is an authority in point. There the servant refused to deliver back some sheep which were on his master's land, and it was held to be no conversion on his part. I am, therefore, of opinion that the rule should be refused.

BEST, J. I thought at the trial that I might properly have nonsuited the plaintiff, but that the safer course was to leave the question to the jury. An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

*Rule refused.*²

VAUGHAN v. WATT.

IN THE EXCHEQUER, EASTER TERM, 1840.

[Reported in 6 Meeson & Welsby, 492.]

TROVER for different articles of wearing apparel, &c. Pleas: first, not guilty; secondly, that the goods were not the property of the plaintiff; on which issues were joined. At the trial before Rolfe, B.,

¹ 2 Mod. 242.

² *Philpott v. Kelley*, 3 A. & E. 106; *Ingalls v. Bulkley*, 15 Ill. 224; *Ward v. Moffett*, 38 Mo. Ap. 395; *Mount v. Derick*, 5 Hill, 455; *Blankenship v. Berry*, 28 Tex. 448 *Accord*.

See also *Clark v. Chamberlain*, 2 M. & W. 78. — ED.

at the Middlesex sittings in Hilary Term, the following appeared to be the facts of the case: On the 24th July, 1839, the goods in question were pledged with the defendant, a pawnbroker, by a female of the name of Hubbard, in the name (as the defendant understood it) of Mary Warne, and the duplicate was so made out. On the next day he was sent to by that person (whom he did not then know, but who afterwards proved to be the plaintiff's wife), to say that she had lost the duplicate, and she demanded and obtained from him a copy thereof, and also a form of a declaration of the loss of it, pursuant to the Stat. 39 & 40 Geo. III., c. 99, § 16, and 5 & 6 Will. IV., c. 62, § 12. Some days afterwards, upon an allegation that this document also was lost, she obtained from the defendant another similar form. On the 6th of August, the plaintiff Vaughan produced the duplicate to the defendant, and demanded the goods, tendering the amount of the pledge and the interest. The defendant refused to give them up, on the ground of the declarations having been obtained from him. On the 7th, the plaintiff made an application to the police magistrate at Hatton Garden, for the purpose of compelling the restoration of the goods, and a summons was granted for the defendant's appearance on the following day, when he attended accordingly, but was compelled to go away before the case was called on. On the 9th, however, the parties again attended before the magistrate; and the plaintiff then stated that it was his wife by whom the goods had been pledged. The magistrate, however, after hearing the circumstances, declined to interfere. The plaintiff then brought this action, the writ being sued out on the 21st August. It was contended for the defendant that there was no evidence of such an absolute refusal by him to deliver up the goods to the plaintiff, as constituted a conversion; and that he was justified in refusing to do so, by the circumstance of the declarations having been obtained by another party claiming to be the owner. The learned judge thought that the mere fact of these documents having been obtained was no defence as against the real owner of the goods, who might in that case never have it in his power to recover possession of them; and, under his Lordship's direction, a verdict was found for the plaintiff, damages £10, leave being reserved to the defendant to move to enter a nonsuit. The jury were discharged as to the second issue.

G. T. White having accordingly obtained a rule for a nonsuit, or for a new trial (citing *Isaac v. Clark*,¹ and *Green v. Dunn*),

Pike now showed cause.²

PARKE, B. The learned judge was incorrect in telling the jury that the mere refusal to deliver the goods to the real owner was a conversion. It was a question for the jury, whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title

¹ 2 Bulst. 312.

² The arguments of counsel, and the concurring opinions of Lord Abinger, C. B., and Rolfe, B., are omitted. — Ed.

to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion. It ought therefore to have been left to the jury, whether the defendant had a *bona fide* doubt as to the title to the goods, and if so, whether a reasonable time for clearing up that doubt had elapsed. The party obtaining the declaration is bound to go before a magistrate, and satisfy him by evidence that he is the real owner of the goods; and if a reasonable time had elapsed in this case for doing so, the defendant had no longer any reasonable ground for detaining them on the 6th of August, for a supposed defect of title. That was a question for the jury. The statute supposes that the party will go before the magistrate immediately; and if three or four days elapse without his doing so, the jury would be well warranted in finding that the reasonable time had elapsed. But it is all for the jury; however strong the facts, the judge cannot take it upon himself to refuse to leave the question to them. Therefore, although the result will clearly be the same, in strict law the defendant is entitled to have the facts submitted to the jury. There must therefore be a new trial.¹

SMITH, ASSIGNEE OF TENANT, A BANKRUPT, v. YOUNG.

AT NISI PRIUS, LORD ELLENBOROUGH, C. J., NOVEMBER 1, 1808.

[Reported in 1 Campbell, 439.]

TROVER for a lease assigned by the bankrupt to the defendant after an act of bankruptcy.

The witness, to prove the demand, stated that he had verbally required the defendant to deliver up the lease, and at the same time served upon him a notice in writing to the like effect.

When the lease was demanded, the defendant said, "he would not deliver it up; but it was then in the hands of his attorney, who had a lien upon it for a small sum of money due him."

Garrow, for the plaintiff, contended that the attorney's possession of the lease was in law the possession of the defendant, who must be considered as having a complete control over it, and that the lien did not,

¹ Pillot v. Wilkinson, 3 H. & C. 345; Watt v. Potter, 2 Mason, 77; Zachary v. Pace, 9 Ark. 212; Merz v. Chicago Co., 36 Minn. 33; Witherspoon v. Blewett, 47 Miss. 570; Robinson v. Burleigh, 5 N. H. 225; Fletcher v. Fletcher, 7 N. H. 452; Cushing v. Breck, 10 N. H. 116; Hett v. Boston Co., 69 N. H. 139; State v. Boston Co., 71 N. H. 57; Thomson v. Sixpenny Sav. Bank, 5 Bosw. 293; Rogers v. Weir, 24 N. Y. 463; McEntee v. N. J. St. Co., 45 N. Y. 34; Ball v. Liney, 48 N. Y. 6; Monnot v. Ibert, 33 Barb. 24; Carroll v. Mix, 51 Barb. 212; Roberts v. Yarboro, 41 Tex. 453 (*semble*) Accord.

See Leighton v. Staples, 8 N. H. 359; Corey v. Bright, 53 Pa. 70; Singer Co. v. King, 14 R. I. 511, 512. — Ed.

under these circumstances, prevent the refusal to deliver up the deed from amounting to a conversion.

LORD ELLENBOROUGH. The defendant would have been guilty of a conversion if it had been in his power; but the intention is not enough. There must be an actual tort. To make a demand and refusal sufficient evidence of a conversion, the party, when he refuses, must have it in his power to deliver up or to detain the article demanded.

*Plaintiff nonsuited.*¹

JACOB CARPENTER, APPELLANT, v. THE MANHATTAN
LIFE INSURANCE CO., RESPONDENT.

IN THE SUPREME COURT, NEW YORK, SEPTEMBER TERM, 1880.

[Reported in 22 Hun, 47.]

BARNARD, P. J.² This is a hard action. The plaintiff was the owner of some hot-house plants which remained upon defendant's premises by its assent, and to accommodate the plaintiff. The plaintiff was notified to remove them, and he delayed doing so for a considerable time; but when he did endeavor to get them, the defendant refused to deliver them to the plaintiff. This was on Saturday, May 17, 1879. On Monday following, the defendant told the plaintiff he might have the plants. On Tuesday, May 20, 1879, this suit was commenced [for the conversion of the plants]. The court charged the jury that the plaintiff was entitled to recover the difference between the market value of the property on Saturday and on Monday, when they were tendered back. We think in this charge the court erred. The conversion was made out by a refusal to deliver the property on Saturday. The plaintiff's right of action was then complete, and could not be destroyed without his consent. If, after a conversion, the goods are received back, either before or after suit brought, it goes to mitigate

¹ Horwood v. Smith, 2 T. R. 750; Canot v. Hughes, 2 Bing. N. S. 451; Lindsay v. Candy, 1 Q. B. D. 348; Williams v. Russell, 39 Conn. 409; Robinson v. Hartridge, 13 Fla. 501; Davis v. Buffum, 51 Me. 160; Dearbourn v. Nat. Bank, 58 Me. 273; Hagar v. Randall, 62 Me. 439; Dietus v. Fuss, 8 Md. 148; Wellington v. Wentworth, *post*, p. 380; Johnson v. Couillard, 4 All. 446; Pitlock v. Wells, 109 Mass. 452; Lockwood v. Bull, 1 Cow. 322; Packard v. Getman, 4 Wend. 613; Hawkins v. Hoffman, 6 Hill, 586; Hill v. Covall, 1 N. Y. 522; Nat. Bank v. Wheeler, 48 N. Y. 492; Gillet v. Roberts, 57 N. Y. 28; Bowman v. Eaton, 24 Barb. 528; Whitney v. Slauson, 30 Barb. 276; Hunt v. Kane, 40 Barb. 638; Hoover v. Alexander, 1 Bail. 510; Robertson v. Wurde-man, Dudley, 234; Morris v. Thompson, 1 Rich. 65; Knapp v. Winchester, 11 Vt. 351 *Accord*.

See also Verrall v. Robinson, 2 Cr., M. & R. 495; Catterall v. Kenyon, 3 Q. B. 310; Edwards v. Hooper, 11 M. & W. 363; Hodgson v. St. Paul Co., 78 Minn. 173; Jenner v. Joliff, 6 Johns. 9; Jenner v. Joliff, 9 Johns. 381; Rogers v. Weir, 34 N. Y. 465-467. — ED.

² Only the opinions of the court are given. — ED.

the damages, and no further.¹ A party whose goods are converted, cannot be forced to receive them back. *Livermore v. Northrup*,² *Reynolds v. Shuler*.³ The judgment should therefore be reversed, and a new trial granted, costs to abide event.

DYKMAN, J. I concur with reluctance.

GILBERT, J., dissented.

*Judgment and order denying new trial reversed, and new trial granted; costs to abide event.*⁴

¹ Sedgwick, Damages (8th ed.), 76; *Plummer v. Reeves*, 83 Ark. 10; *Greenfield Bank v. Leavitt*, 17 Pick. 1; *Watson v. Coburn* (Neb., 1892), 53 N. W. R. 477; *Stillwell v. Farwell* (Vt., 1892), 24 Atl. R. 243; *Cernahan v. Chrysler*, 107 Wis. 645 *Accord.* — Ed.

² 44 N. Y. 107.

³ 5 Cow. 323

⁴ On principle, and by the earlier English decisions, an unaccepted tender of the converted goods was no ground for reducing the amount of the plaintiff's recovery for the conversion. *Wilcock's Case*, 2 Salk. 597; *Bovington v. Parry*, 2 Stra. 822; *Watkinson v. Cockshot*, Cooke, Pr. Cas. 130. An opposite practice seems to have begun in 1731, *Tuney v. Clark*, Cooke, Pr. Cas. 59; 1733, *Billings v. Wilcocks*, Cooke, Pr. Cas. 59; 1739, *Cooke v. Holgate*, Pr. Reg. 260; *Barnes*, Notes, 281; *Cooke*, Pr. Cas. 130, s. c. But these cases were disregarded, and the old common law rule followed in *Olivant v. Berino*, 1 Wils. 23, 2 Stra. 1191, s. c.; *Harding v. Wilkin*, *Sayer*, 120 (explaining *Catling v. Bowling*, Say. 80).

These cases were in turn overruled in 1762 by *Fisher v. Price*, 3 Burr. 1363, where Lord Mansfield and Mr. Justice Wilmot laid down the rule that "where trover is brought for a specific chattel, of an ascertained quantity and quality, and unattended with any circumstances that can enhance the damages above the real value; . . . there the specific thing demanded may be brought into court (and Mr. Justice Wilmot said this was the more reasonable, as this action of trover comes in the place of the old action of detinue)." Lord Mansfield's rule has since prevailed in England. 1796, *Pickering v. Truste*, 7 T. & R. 49; 1822, *Coombe v. Sanson*, 1 D. & Ry. 201; 1826, *Brunsdan v. Austin*, 1 Tidd Pr. (ed. 1824) 571; 1826, *Tucker v. Wright*, 3 Bing. 601; 1828, *Earle v. Holderness*, 4 Bing. 462; 1833, *Gibson v. Humphrey*, 1 Cr. & M. 544; *Hiort v. London*, 4 Ex. D. 188.

A tender of the converted chattel to the owner goes in reduction of damages in Missouri and Vermont, *Ward v. Moffett*, 38 Mo. App. 395; *Rutland Co. v. Bank*, 32 Vt. 639. Also in New Jersey if conversion technical and not wilfully wrongful. *Bigelow Co. v. Heintze*, 53 N. J. 69.

But the rule of the principal case prevails generally in this country. 1 Sedgwick, Damages (8th ed.), 74; *Comm. Bank v. Hughes*, 17 Wend. 91; *Otis v. Jones*, 21 Wend. 394, 396; *Higgins v. Whitney*, 24 Wend. 379, 380; *Brewster v. Silliman*, 38 N. Y. 423; *Kelly v. Mesier*, 21 N. Y. Ap. Div. 253; *Baltimore Co. v. O'Donnell*, 49 Oh. St. 489; *Whitaker v. Houghton*, 86 Pa. 48 (*semble*); *Crawford v. Thomason* (Tex. Civ. Ap. 1909), 117 S. W. R. 181.

In *Hayward v. Seaward*, 1 M. & Sc. 459, where the facts were similar to those in the principal case, the court appear to have thought that the subsequent tender cured the original conversion. Such a view is plainly erroneous. The case must be supported, if at all, upon the ground suggested by *Bronson, J.*, in *Otis v. Jones*, 21 Wend. 396: "The case of *Hayward v. Seaward* does not proceed on the ground that a tort can be cured by a tender without acceptance, but on the ground that there had been no conversion of the property." See also *Gaughan v. St. Lawrence Co.*, 3 Ont. Ap. 392, 399; *Wells v. Kelsey*, 15 Abb. Pr. 53; *Savage v. Perkins*, 11 How. Pr. 17. — Ed.

SECTION II. (*continued.*)

(i) EXCUSABLE CONVERSION.

DRAKE v. SHORTER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 9, 1803.

[Reported in 4 *Espinasse*, 165.]

TROVER for a boat. Plea of general issue.

The case stated on the part of the plaintiff was, that the defendant who was employed in an invention for making a vessel sail against wind and tide, had employed the plaintiff to work on her; that while the vessel was so working on, she took fire; that the defendant took a boat belonging to the plaintiff, to endeavor to extinguish it, but that she sunk, and was lost.

Garrow, for the defendant, stated his defence to be, that while the plaintiff was working on the vessel, it was his duty to have taken care of her, and that the interference, in this case, was to prevent the fire spreading, by means of which the accident happened; which he contended was lawful.

LORD ELLENBOROUGH said, that if the fact was so, he thought it amounted to a defence; that what might be a tort under one circumstance, might, if done under others, assume a different appearance; as, for example, if the thing for which the action was brought, and which had been lost, was taken to do a work of charity, or to do a kindness to the party who owned it, and without any intention of injury to it, or of converting it to his own use; if, under any of these circumstances, any misfortune happened to the thing, it could not be deemed an illegal conversion; but as it would be a justification in an action of trespass, it would be a good answer to an action of trover.¹

¹ COKE, C. J.: "There was a case resolved in the C. B. when I was there, concerning Gravesend barge, in which were a great number of passengers; one there had a pack of great value and of great weight in the barge. There suddenly happened a very great storm, and they were all in great danger, and were, for their own safety, enforced to throw out a great part of the goods for the safeguard of their lives which were then in the barge; amongst which goods, for the lightening of the barge, this pack of goods was thrown over; afterwards, he which was the owner of this pack, brought his action upon the case against the bargeman, for these his goods thus cast over; and we all there did resolve it clearly that this being the act of God, this sudden storm, which occasioned the throwing over of the goods, and could not be avoided, and for this cause he recovered nothing. The whole court agreed with him herein." *Bird v. Astock*, 2 Bulst. 280.

1 Roll. Ab. 6, pl. 5 (taking beds for the king's retinue); *Kennet v. Robinson*, 2 J. J. Marsh. 84 (caring for a neglected horse); *Jones v. Fort*, 9 B. & C. 764 (collecting bills of exchange to save loss); *Philpott v. Kelley*, 3 A. & E. 106 (bottling wine to save it); *Nelson v. Merriam*, 4 Pick. 249 (taking care of an estray); *Wilson v. McLaughlin*, 107 Mass. 587 (caring for an animal); *Perkins v. Ladd*, 114 Mass. 420 (sale

The defendant failed in proving the circumstances as to the ship being in the plaintiff's care; so that the accident of the fire proceeded from the defendant himself; and the plaintiff had a verdict.

STEVENS v. CURTIS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1836.

[Reported in 18 *Pickering*, 227.]

IN this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway, without being guilty of a conversion.¹

WELLINGTON v. WENTWORTH.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1844.

[Reported in 8 *Metcalf*, 548.]

TROVER for a cow. The parties submitted the case to the decision of the court on the statement of facts which follows:—

The defendants, inhabitants of Canton, in this county, being owners of pasture lands in New Hampshire, in May or June of each year, drive their own cattle to said lands, and also drive others' cattle, which they take to pasture at an agreed price, and in each autumn drive them back. In May or June, 1842, the defendants were jointly driving 151 head of cattle, of their own and of their neighbors', along the highway in Dorchester, where the plaintiff resides, and the plaintiff's cow unperceived by the defendants, and temporarily running at large in said highway, without a keeper, joined the cattle aforesaid, without the knowledge of the defendants. The defendants first stopped, at night, at Lexington, counted their drove, and found they had precisely the number they started with. They therefore supposed that they had all, and no more than their own and their neighbors' cattle, which they had taken to pasture. In fact, however, the defendants had lost one cow

of deceased soldier's perishable property); *Payne v. Robinson*, Harp. 279 (seizure and detention of slaves in insurrection); *Sharp v. Nesmith*, 6 Rich. 31 (seizure of chattel to prevent consummation of a fraud).

But see *McCarroll v. Stafford*, 24 Ark. 224 (seizure of chattel to save it from destruction).—ED.

¹ *Wilson v. McLaughlin*, 107 Mass. 587; *Bonney v. Smith*, 121 Mass. 155; *Medlin v. Balch*, 102 Tenn. 710; *Tobin v. Deal*, 60 Wis. 87 *Accord*.—ED.

from their drove as they passed through Milton, but did not discover the loss until their return from New Hampshire. The plaintiff's cow was pastured in New Hampshire, by the defendants, during the season of 1842; and in the autumn of that year, as the defendants returned with their drove, they returned the plaintiff's cow to him, and he then received her. During said pasturing season, said cow had a calf, which was returned to the plaintiff with the cow.

The defendants, when they found the cow which was lost from their drove, as aforesaid, supposed that some of their neighbors had turned in one more cow than was reported, and never suspected that they had in their drove any cow that was not delivered to them to be pastured, until about four weeks after their return from New Hampshire, when the plaintiff called on them, at Canton, to make inquiries, and demanded his cow.

Defendants to be defaulted, if the plaintiff is entitled to maintain his action on the foregoing facts; otherwise, the plaintiff to become nonsuit.

E. Ames, for the defendants.¹

No counsel appeared for the plaintiff.

SHAW, C. J. The court can perceive in this case no proof of a conversion. There was certainly no unlawful taking of the cow. On the contrary, it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendants' drove. *Rev. Sta. c. 19, § 22; Wild v. Skinner.*² Nor can we perceive any evidence of a conversion by a refusal to deliver the cow upon demand. For ought that appears, the cow was delivered on the first notice of the plaintiff that she was his property, and request to deliver her up; and we are to consider that such was the fact. *Plaintiff nonsuit.*³

T. CLEGG v. BOSTON STORAGE WAREHOUSE CO.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1889.

[*Reported in 149 Massachusetts Reports, 454.*]

W. ALLEN, J. This is an action of tort against a warehouseman for the conversion of goods that belonged to the plaintiff, which were put in storage by him with the defendant. While in the defendant's warehouse, the goods were attached on a writ against a former owner of them as his property, and continued in the possession of the attaching officer under the attachment until they were replevied by another claim-

¹ The argument for the defendants is omitted. — ED.

² 23 Pick. 251.

³ *Van Valkenburg v. Thayer*, 57 Barb. 196 *Accord*.

Platt v. Tuttle, 23 Conn. 233 *Contra*. See *Hills v. Snell*, 104 Mass. 173; *Lee v. McKay*, 3 Ired. 29. — ED.

ant. The conversion relied on is the delivery of the goods by the defendant to the attaching officer. It is conceded that the officer had no authority to attach them, and the question presented is, whether the facts stated show such delivery of the goods by the defendant as will constitute a conversion of them.

The goods were stored by the defendant in its warehouse, in a locked compartment, to which the defendant held the key. The attaching officer went to the warehouse with a writ of attachment against one Preston, and demanded access to the goods in order to attach them on the writ, declaring that they were the property of Preston. The defendant opened the door of the compartment where the goods were, and the officer took them on the writ. All the defendant knew in regard to the ownership of the goods was that they had that day been delivered at the warehouse by a teamster, who ordered them to be stored in the name of Thomas Clegg, and there is nothing to show want of good faith or of due care on the part of the defendant, except the fact that it opened the door on the demand of the officer. The plaintiff relies on the rule that delivery of goods by a warehouseman to a person not authorized to receive them is a conversion. See *Lichtenhein v. Boston & Providence Railroad*; ¹ *Hall v. Boston & Worcester Railroad*.² It may be assumed that it is not necessary that there should be a manual delivery of the goods by the warehouseman, but that it is sufficient if they are taken from his possession by his permission, —if he voluntarily surrenders the possession of them.

In the case at bar, there was no actual delivery of the goods by the defendant, and the facts show that the taking was not by its permission, and that it did not voluntarily surrender the possession. If the goods had been taken by a stranger, under a claim of title, in the presence of the defendant's agents, without objection, the defendant might have been held to have permitted the taking; but it cannot be contended that a taking by legal process, by an officer of the law, into the custody of the law, was by the permission of the defendant, nor that the failure to resist or impede the officer was a voluntary surrender of the possession of the goods to him. It is true that the officer was liable as a trespasser to the owner of the goods, but it would not be on that account less true that he took them by virtue of his process, and not by the permission of the defendant, nor that the defendant, if it surrendered the possession to the officer, did it in submission to legal process, and not voluntarily. *Stiles v. Davis*,³ In *Edwards v. White Line Transit Co.*,⁴ in which it was held that a common carrier was liable on his contract as carrier for the failure to deliver goods that were taken from him under an attachment against a person not their owner, it is said, "In one sense, the property was in the custody of the law; so far, at least, that the surrender of its possession to the officer claiming to attach it upon legal process was not tortious on the part of the

¹ 11 Cush. 70.

² 1 Black. 101.

³ 14 Allen, 439.

⁴ 104 Mass. 159.

carrier, so as to subject him to the charge of converting it to his own use."¹

The fact that the defendant exposed the goods to the officer, on his demand, does not show that the taking by him was by the permission or connivance of the defendant. The officer had a writ which authorized him to take the goods of Preston, and to break open doors for that purpose; he asserted his right, and declared his purpose to attach such goods in the warehouse in the defendant's possession as belonged to Preston, and demanded access to them. The defendant did not know whether the goods belonged to Preston or to the person in whose name they were stored, but that is immaterial. It was under no obligation if it had the right, and it had no power, to prevent the opening of the door and the taking of the goods by the officer. The facts that it opened the door with the key which was the only means of opening it without breaking, that it did not oppose or impede the officer in finding and taking the goods, or even that, on the demand of the officer, it pointed out to him the particular goods he was in search of, do not show any intention to give permission to the officer to take the goods, but submission to the legal process, and to the authority claimed and exercised by the officer under it.

The fact, that, while the goods were in the possession of the officer under the attachment, he did not remove them from the defendant's warehouse, but stored them there in charge of a keeper, and paid storage therefor to the defendant, does not show a conversion of the goods by the defendant.

On all the facts, we see no ground on which the defendant can be held liable.

*Judgment affirmed.*²

E. M. Johnson, for the plaintiff.

F. L. Hayes, for the defendant.

¹ The decision in *Edwards v. White Co.*, that a carrier, who surrenders goods to an officer having an attachment against one not their owner, though not liable in trover, is liable in contract, is at variance with the following cases: *Stiles v. Davis*, 1 Black, 101; *The M. M. Chase*, 37 F. R. 708 (*semble*); *Ohio Co. v. Yoke*, 51 Ind. 181; *Pingree v. Detroit Co.*, 66 Mich. 143 (in effect overruling *Gibbons v. Farwell*, 63 Mich. 344); *Jewett v. Olsen*, 18 Oreg. 419 (*semble*).—ED.

² *Edwards v. White Co.*, 104 Mass. 159, 162 *Accord*.

A refusal by a bailee to deliver to the owner his goods, on the ground that they have been taken on legal process in a proceeding against a third person, is not a conversion. *Verrall v. Robinson*, 2 C. M. & R. 495; *Catterall v. Kenyon*, 3 Q. B. 310; *Pillot v. Wilkinson*, 3 H. & C. 345; *Stiles v. Davis*, 1 Black, 101; *French v. Star Co.*, 134 Mass. 233. But see *Rogers v. Weir*, 34 N. Y. 463.—ED.

WARING v. PENNSYLVANIA RAILROAD CO.

IN THE SUPREME COURT, PENNSYLVANIA, NOVEMBER 6, 1874.

[Reported in 76 *Pennsylvania Reports*, 491.]

ERROR to the Court of Common Pleas of Allegheny county : of October and November Term, 1874, No. 213.

This was an action of trover, commenced October 8th, 1868, by the Pennsylvania Railroad Company against Edward J. Waring.

MR. JUSTICE GORDON delivered the opinion of the court, January 4th, 1875¹ : —

Lord Mansfield defines the action of trover to be, “ a remedy to recover the value of personal chattels wrongfully converted by another to his own use.”² The taking may have been lawful, hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them upon demand made. Ordinarily where such goods have been converted by the bailee, the law presumes it to be wrongful, and the action may be rebutted without a previous demand; but such presumption may be rebutted, showing a permission from the plaintiff to convert the property. So we may suppose a case of this kind : A. purchased a ton of wheat flour from B., a miller, B. delivers to A. a ton of wheat flour belonging to C., and A. converts it to his own use. Now it cannot be that B., as bailee of C., can maintain trover against A., without first explaining to him the mistake, and demanding of him a return of C.’s flour; for here the conversion is not wrongful, but permissive, there being nothing in the transactions which would lead A. to suppose that he had gotten any but his own property.

This example will apply to the case in hand. The defendant offered to prove that he had received from the railroad company no more car loads of oil than he was entitled to. This, as we understand the offer, not by way of recoupment, which was not permissible, but to show that he received the oil in good faith, supposing it to be his own. By his subsequent offers, he proposed to prove, that if he received the oil in dispute at all, it was by a delivery from the plaintiffs’ agents; if there was an error, it was produced by the plaintiffs, and finally that the defendant received the property “ at the instance and request of the plaintiffs.”

The offers should not have been overruled. Had the proof therein proposed been produced, it is clear the plaintiffs had no case.

On such showing the defendant did no wrong, there was no wrongful conversion, and the action of trover would not lie. We observe no error in the charge, or in the answer to the points. Under the evidence,

¹ Only the opinion of the court is given. —Ed.

² 1 Chit. Plead. 146.

as admitted, they were correct. A wrongful conversion of the oil in question by the defendant, would sustain the action, and if he, or the firm of which he was a member, knowingly took advantage of the mistake of the plaintiffs' agents, and appropriated the property of another to the use of the firm, it would be such a conversion. This is the substance of the charge, and is, so far as it goes, a sound exposition of the law.

*The judgment reversed, and a venire
facias de novo awarded.*

¹ *Morris v. Buchanan*, 6 C. & P. 18; *Hills v. Snell*, 104 Miss. 173; *Freeman v. Etter*, 21 Minn. 2; *Tousley v. Board*, 39 Minn. 419 *Accord*.

The seizure by an officer of gambling apparatus, obscene pictures, counterfeit money, and the like is justifiable. *Willis v. Warren*, 1 Hilt. 590; *Spalding v. Preston*, 21 Vt. 9.

See *Du Bost v. Beresford*, 2 Camp. 511. — Ed.

CHAPTER III.

DEFAMATION.

SECTION I.

Publication.

HALL v. HENNESLEY.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[Reported in *Croke's Elizabeth*, 486.]

ACTION for words. Whereas he was robbed by persons unknown of divers parcels of linen cloth; that the defendant *præmissa sciens*, in slander of the plaintiff, spake these words in the presence of divers others, viz.: "Hugh Hull" (*innuendo* the plaintiff) "hath received three pieces of his cloth again of the thief, and beareth with the thief, and if I have any hurt hereafter, I will charge him with it." After verdict for the plaintiff, it was moved in arrest of judgment that this declaration was not good; for it is that he spake those words *in præsentia diversorum*, and doth not say *in auditu*, and if none heard, it is not a slander; and as to it, *non allocatur*. For it shall be necessarily intended that it was *in auditu*, when it was *in præsentia*, &c.¹ But for the words themselves, they all held that they were not actionable.

Wherefore it was adjudged for the defendant.

¹ *Miller v. Johnson*, 79 Ill. 58; *McGowan v. Manifee*, 7 Monr. 314; *Brown v. Brashier*, 2 P. & W. 114; *Burbank v. Horn*, 39 Me. 235 *Accord*. See *Curtis v. Moore*, 15 Wis. 137.

An averment of publication is sufficient without adding "in the presence of others." *Taylor v. How*, Cro. El. 861; *Ware v. Cartledge*, 24 Ala. 622; *Goodrich v. Warner*, 21 Conn. 432; *Burton v. Burton*, 3 Greene, 316; *Watts v. Greenlee*, 2 Dev. 115; *Hurd v. Moore*, 2 Oreg. 85; *Duel v. Agan*, 1 Code Reporter, 134; *Waistel v. Holman*, 2 Hall, 172; *Wilcox v. Moon*, 63 Vt. 481; *Benedict v. Westover*, 44 Wis. 404.

An allegation that defendant printed in a newspaper amounts to a statement of a publication. *Baldwin v. Elphinstone*, 2 Bl. 1037. See *Watts v. Fraser*, 7 A. & E. 223; *Sproul v. Pillsbury*, 72 Me. 20. — Ed.

CLUTTERBUCK v. CHAFFERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 14, 1816.

[Reported in 1 Starkie, 471.]

THIS was an action for the publication of a libel.

The witness who was called to prove the publication of the libel (which was contained in a letter written by the defendant to the plaintiff) stated on cross-examination that the letter had been delivered to him folded up, but unsealed, and that without reading it, or allowing any other person to read it, he had delivered it to the plaintiff himself, as he had been directed.

LORD ELLENBOROUGH held that this did not amount to a publication which would support an action, although it would have sustained an indictment,¹ since a publication to the party himself tends to a breach of the peace.

*Verdict for the defendant.*²

SNYDER v. ANDREWS.

SUPREME COURT, NEW YORK, MARCH 5, 1849.

[Reported in 6 Barbour, 43.]

THIS was an action on the case for a libel. The defendant pleaded the general issue, and gave notice of special matter.³

The cause was tried at the Saratoga circuit in November, 1847, before Justice Paige. On the trial the defendant admitted that he wrote the letter containing the alleged libel, sealed the same, and put it into the post-office at Saratoga Springs, directed to the plaintiff at his residence. The plaintiff proved by John R. Brown that the letter

¹ Edwards v. Wooton, 12 Rep. 35; Peacock v. Raynel, 2 Brownl. 151; Barrow v. Lewellin, Hob. 62; Hick's Case, Hob. 215; Rex v. Burdett, 4 B. & Ald. 95 *Accord.* — Ed.

² Phillips v. Jansen, 2 Esp. 624; Ward v. Smith, 4 C. & P. 305; Sharp v. Skues, (C. A. 1909) 25 T. L. R. 336; Warnock v. Mitchell, 43 Fed. 428; Western Co. v. Cashman, 149 Fed. 367; Spaits v. Poundstone, 87 Ind. 523; Yonsling v. Dare, 123 Iowa, 539; Lyon v. Lash, 74 Kan. 745; Buckwalter v. Gosson, 75 Kan. 147; McIntosh v. Matherly, 9 B. Monr. 119; Roberts v. English Co., (Ala. 1908) 46 So. R. 752; Dickinson v. Hathaway, (La. 1909) 48 So. R. 138; Gambrill v. Schooley, 93 Md. 48; Rumney v. Worthley, 186 Mass. 144, 145; Youmans v. Smith, 153 N. Y. 214, 218; Lyle v. Clason, 1 Caines, 581; Waistel v. Holman, 2 Hall, 172; Prescott v. Tousey, 50 N. Y. Sup'r Ct. 12; Fonville v. McNease, Dudley, 303; State v. Syphrett, 27 S. Ca. 29; Fry v. McCord, 95 Tenn. 678; Sylvie v. Miller, 96 Tenn. 94; Wilcox v. Moon, 63 Vt. 481; Wilcox v. Moon, 64 Vt. 450 *Accord.*

See Aherne v. Maguire, A. M. & O. 42.

If two persons combine in sending a libel to the plaintiff, each is guilty of a publication to the other. Spaits v. Poundstone, 87 Ind. 523, 524, 525.

In Virginia, by statute, an action lies for insulting words written or spoken, although not read or heard by a third person. Rolland v. Batchelder, 84 Va. 664; Strode v. Clement, 90 Va. 553. — Ed.

³ Part of the case, not relating to publication, is omitted. — Ed.

was read to the witness by the defendant at his office in the presence of a young man who was a clerk of the defendant. The defendant's counsel then moved for a nonsuit, on the ground that a publication of the libel had not been proved. The judge denied the motion.

The jury found a verdict for the plaintiff of \$250. And the defendant, upon a bill of exceptions, moved for a new trial.

A. Bokes, for the plaintiff. *D. Wright*, for the defendant.

WILLARD, J. The fact that the defendant read the letter to a stranger, before it was sent to the plaintiff, was not questioned on the trial, and is assumed to be true by the form of the objection; but it is insisted that such reading did not amount to a publication of the libel. No man incurs any civil responsibility by what he thinks or even writes, unless he divulges his thoughts to the temporal prejudice of another. Hence, a sealed letter containing libellous matter, if communicated to no one but to the party libelled, is not the foundation for a civil action, although it may be of an indictment. *Lyle v. Clason*; ¹ *Hodges v. The State*; ² *Phillips v. Jansen*.³ But where the defendant, knowing that letters addressed to the plaintiff were usually opened by and read by his clerk, wrote a libellous letter and directed it to the plaintiff, and his clerk received and read it, it was held there was a sufficient publication to support the action. *Dela-croix v. Thevenot*. And in *Schenck v. Schenck*,⁴ a sealed letter addressed and delivered to the wife containing a libel on her husband was held a publication sufficient to enable the latter to sustain an action.⁵ Reading or singing the contents of a libel in the presence of others has been adjudged a publication. 2 Starkie on Slander, 16; 5 Rep. 125; 9 Id. 59 b; 1 Saund. 132, n. 2. The reading of the letter in question by the defendant in the presence of Brown was a sufficient publication to sustain this action. *New trial denied*.⁶

¹ 1 Caines, 581.

² 5 Humphrey, 112; 1 Wms. Saund. 132, n. 2.

³ 2 Esp. 626; 2 Starkie on Slander (Wend. ed.), 14.

⁴ 1 Spencer, 208.

⁵ *Wenman v. Ash*, 13 C. B. 836; *Jones v. Williams*, 1 Times, L. R. 572; *Sesler v. Montgomery*, 78 Cal. 486, 489 (*semble*); *Luick v. Driscoll*, 13 Ind. Ap. 279; *Wilcox v. Moon*, 63 Vt. 481; *Wilcox v. Moon*, 64 Vt. 480 *Accord*.

But a communication by the libeller to his own wife is said not to be a publication. *Wennhak v. Morgan*, 20 Q. B. D. 635; *Sesler v. Montgomery*, 78 Cal. 486; *Trumbull v. Gibbons*, 3 City H. Rec. 97. But see *State v. Shoemaker*, 101 N. Ca. 690. It would be more accurate to say that the communication in such a case is privileged. — Ed.

⁶ *M'Cosmbs v. Tuttle*, 5 Blackf. 481; *Van Cleaf v. Lawrence*, 2 City H. Rec. 41, *Accord*. — Ed.

DELACROIX v. THEVENOT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., MARCH 4, 1817.

[Reported in 2 Starkie, 63.]

THIS was an action for a libel and slanderous words. The libel was contained in a letter directed to plaintiff.

A clerk of the plaintiff proved that he had received the letter; that it was in the handwriting of the defendant; and that in the absence of the plaintiff he was in the habit of opening letters directed to him which were not marked "private." He further stated that defendant, who was well acquainted with the plaintiff, was aware of the nature of his (the clerk's) employment, and that he believed defendant knew that witness was in the habit of opening plaintiff's letters.

LORD ELLENBOROUGH said that there was sufficient evidence for the jury to consider whether defendant did not intend the letter to come to the hands of a third person, which would be a publication.

Verdict for plaintiff. Damages, £100.¹

SHEFFILL AND WIFE v. VAN DEUSEN AND WIFE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1859.

[Reported in 13 Gray, 304.]

ACTION of tort for slander.

BIGELOW, J.² Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self-estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication; although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. So, too, it must be shown that the words were spoken in

¹ Wyatt v. Gore, Holt, 299; Wenman v. Ash, 13 C. B. 836; Klene v. Ruff, 1 Iowa, 482; Allen v. Wortham, 89 Ky. 485; Rumney v. Worthley, 186 Mass. 144; Schenck v. Schenck, Spencer, 208; State v. McIntire, 115 N. Ca. 769; Wilcox v. Moon, 64 Vt. 450; Adams v. Lawson, 17 Gratt. 250 Accord.

See Fox v. Broderick, 14 Ir. C. L. R. 453; Callan v. Gaylord, 3 Watts, 321. — ED.

² Only the opinion of the court is given. — ED.

the presence of some one who understood them. If spoken in a foreign language, which no one present understood, no action will lie therefor.¹ *Edwards v. Wooton*; ² *Hick's Case*; ³ *Wheeler & Appleton's Case*; ⁴ *Phillips v. Jansen*; ⁵ *Lyle v. Clason*; ⁶ *Hammond N. P.* 287.

It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by third persons? The defendants were therefore entitled to the instructions for which they asked.

*Exceptions sustained.*⁷

¹ *Jones v. Davers*, Cro. Eliz. 496; *Price v. Jenkins*, Cro. El. 865; *Amann v. Damm*, 8 C. B. N. S. 597; *Kiene v. Ruff*, 1 Iowa, 42; *Hurtert v. Weines*, 27 Iowa, 134; *Milenz v. Quasdorf*, 68 Iowa, 726; *Wormouth v. Cramer*, 3 Wend. 394 *Accord*.

See *Bechtell v. Shatler*, Wright (Ohio), 107. Conf. *Anon.*, Moore, 182; *Gibbs v. Jenkins*, Hob. 191; *Zenobio v. Axtell*, 6 T. R. 162; *Jenkins v. Phillips*, 9 C. & P. 766; *Hickley v. Grosjean*, 6 Blackf. 351; *Kernholtz v. Becker*, 3 Den. 346; *Rahanser v. Barth*, 3 Watta, 28; *Zeig v. Ort*, 3 Chandl. 26; *K. v. H.*, 20 Wis. 239; *Filber v. Dauterman*, 26 Wis. 518; *Simonson v. Herald Co.*, 61 Wis. 626; *Petzer v. Benisly*, 67 Wis. 291. — Ed.

² 12 Co. 35.

³ Pop. 139 and Hob. 215.

⁴ Godb. 340.

⁵ 2 Esp. 624.

⁶ 1 Caines, 581.

⁷ *Anon.*, Sty. 70; *Force v. Warren*, 15 C. B. N. S. 808; *Desmond v. Brown*, 33 Iowa, 13; *Marble v. Chapin*, 132 Mass. 225, 226; *Broderick v. James*, 3 Daly, 481 *Accord*.

MAILING OF POST CARD. Three views have been expressed as to whether the mailing of a post card is a publication.

(1) The mailing is a publication. *Sadgrove v. Hole*, [1901] 2 K. B. 1, 4, 5 (*semble*); *Logan v. Hodges*, 146 N. Ca. 38; *Spence v. Burt*, 18 Lanc. L. Rev. 251; *Robinson v. Jones*, L. R. 4 Ir. 391 (*semble*); *McCann v. Edinburgh Co.*, L. R. 28 Ir. 24, 28 per Pilles, C. B.

(2) The mailing is *prima facie* a publication. *Odgers, Libel and Slander*, (4th Ed.) 153, 281.

(3) The mailing is *prima facie* not a publication i. e., is not a publication unless evidence is given that the post card was read *in transitu*. *Steele v. Edwards*, 15 Oh. C. C. 52, 58.

PUBLICATION IN IGNORANCE OF THE LIBEL. The dissemination of a libel by a carrier or newsvender or a public library, who neither knew nor ought to have known of the libel and who had no reason to suppose that the newspaper was likely to contain libellous matters, gives no cause of action. *Emmens v. Pottle*, 16 Q. B. D. 854; *Martin v. Trustees of British Museum*, 10 T. L. R. 338. But the proprietor of a circulating library was held liable for giving out a book containing defamatory statements, because his freedom from negligence did not appear. *Vizetelly v. Mudie's Library*, [1900] 2 Q. B. 170. See also *Morris v. Ritchie*, Court of Sess., March 12, 1902, 4 F. 645. — Ed.

SECTION II.

Libel.

THORLEY v. LORD KERRY.

IN THE EXCHEQUER CHAMBER, MAY 9, 1812.

[Reported in 4 Taunton, 355.]

THIS was a writ of error brought to reverse a judgment of the Court of King's Bench. "This was an action for a libel contained in a letter addressed to Lord Kerry, and sent open by one of his servants, who became acquainted with its contents. The libel charged his Lordship with being a hypocrite, and using the cloak of religion for unworthy purposes."¹ Upon not guilty pleaded, the cause was tried at the Surrey spring assizes, 1809, when the writing of the letter by the defendant was proved, and that he delivered it unsealed to a servant to carry, who opened and read it; a verdict was found for the plaintiff with £20 damages, and judgment passed for the plaintiff without argument in the court below. The plaintiff in error assigned the general errors.

Barnewall, for the plaintiff in error.

MANSFIELD, C. J., delivered the opinion of the court.

This is a writ of error, brought to reverse a judgment of the Court of King's Bench, in which there was no argument. It was an action on a libel published in a letter which the bearer of the letter happened to open. The declaration has certainly some very curious recitals. It recites that the plaintiff was tenant to Archibald Lord Douglas of a messuage in Petersham; that, being desirous to become a parishioner and to attend the vestry, he agreed to pay the taxes of the said house, that the plaintiff in error was churchwarden, and that the defendant in error gave him notice of his agreement with Lord Douglas; and that the plaintiff in error, intending to have it believed that the said earl was guilty of the offences and misconducts thereafter mentioned (offences there are none, misconduct there may be), wrote the letter to the said earl which is set forth in the pleadings. There is no doubt that this was a libel, for which the plaintiff in error might have been indicted and punished; because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies; and I should have thought that the peace and good name of individuals was sufficiently guarded by the terror of this criminal proceeding in

¹ This short statement of the case, taken from 3 Camp. 214, has been substituted for the declaration which is set out at considerable length in the original report. — Ed.

such cases. The words, if merely spoken, would not be of themselves sufficient to support an action. But the question now is, whether an action will lie for these words so written, notwithstanding such an action would not lie for them if spoken; and I am very sorry it was not discussed in the Court of King's Bench, that we might have had the opinion of all the twelve judges on the point, whether there be any distinction as to the right of action between written and parol scandal; for myself, after having heard it extremely well argued, and especially, in this case, by Mr. Barnewall, I cannot, upon principle, make any difference between words written and words spoken, as to the right which arises on them of bringing an action. For the plaintiff in error it has been truly urged, that in the old books and abridgments no distinction is taken between words written and spoken. But the distinction has been made between written and spoken slander as far back as Charles the Second's time, and the difference has been recognized by the courts for at least a century back. It does not appear to me that the rights of parties to a good character are insufficiently defended by the criminal remedies which the law gives, and the law gives a very ample field for retribution by action for words spoken in the cases of special damage, of words spoken of a man in his trade or profession, of a man in office, of a magistrate or officer; for all these an action lies. But for mere general abuse spoken, no action lies. In the arguments both of the judges and counsel, in almost all the cases in which the question has been, whether what is contained in a writing is the subject of an action or not, it has been considered whether the words, if spoken, would maintain an action. It is curious that they have also adverted to the question, whether it tends to produce a breach of the peace; but that is wholly irrelevant, and is no ground for recovering damages. So it has been argued that writing shows more deliberate malignity; but the same answer suffices, that the action is not maintainable upon the ground of the malignity, but for the damage sustained. So it is argued that written scandal is more generally diffused than words spoken, and is, therefore, actionable; but an assertion made in a public place, as upon the Royal Exchange, concerning a merchant in London, may be much more extensively diffused than a few printed papers dispersed, or a private letter; it is true that a newspaper may be very generally read, but that is all casual. These are the arguments which prevail on my mind to repudiate the distinction between written and spoken scandal; but that distinction has been established by some of the greatest names known to the law, Lord Hardwicke, Hale, I believe Holt, C. J., and others. Lord Hardwicke, C. J., especially has laid it down that an action for a libel may be brought on words written, when the words, if spoken, would not sustain it. Com. Dig. tit. Libel, referring to the case in Fitzg. 122, 253, says there is a distinction between written and spoken scandal; by his putting it down there as he does, as being the law, without making any query or doubt upon it, we are led to

suppose that he was of the same opinion. I do not now recapitulate the cases, but we cannot, in opposition to them, venture to lay down at this day that no action can be maintained for any words written, for which an action could not be maintained if they were spoken; upon these grounds we think the judgment of the Court of King's Bench must be affirmed. The purpose of this action is to recover a compensation for some damage supposed to be sustained by the plaintiff by reason of the libel. The tendency of the libel to provoke a breach of the peace, or the degree of malignity which actuates the writer, has nothing to do with the question. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken.

*Judgment affirmed.*¹

¹ The distinction sanctioned in the principal case between oral and written scandal still obtains in England and the United States. The definition of a libel as a written publication calculated to bring another into hatred, ridicule, or contempt, is also universally recognized in English-speaking countries. As it is a pure question of fact for the jury whether the publication in a given case comes within this definition, it has not seemed advisable to bring together in this book the multitudinous instances which have been passed upon. A full collection of the cases may be found in Odgers, *Libel and Slander* (2d ed.), 20-24; Townshend, *Slander and Libel* (4th ed.), 203-221; 13 *Am. & Eng. Encyc. of Law*, 299-308. — ED.

An action for a libel made in the course of judicial proceedings cannot be maintained until the proceedings have terminated in favor of the person defamed. *Masterson v. Brown*, 72 Fed. 136. — ED.

SECTION III.

Slander.

(a) WORDS IMPUTING CRIME.

BROWNE v. HAWKINS.

IN THE KING'S BENCH, TRINITY TERM, 1477.

[Reported in Year Book, 17 Edward IV., folio 3, placitum 2.]

Townsend. As to the claim [that the plaintiff was the villein of the defendant] this is only a defamation [*infamy*], as if one calls me a thief, which gives no action in our law. . . .

BILLING, C. J., and NEEDHAM, J. . . . There are divers cases in our law where one shall have *damnum absque injuria*; as for defamation in calling one a thief, or traitor, this is a damage in our law, but no tort.¹

ANONYMOUS.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1535.

[Reported in Year Book, 27 Henry VIII., folio 14, placitum 4.]

AN action on the case was brought because the defendant called the plaintiff a heretic, and one of the new learning.

Wilby asked if this action would lie here, since it was a spiritual matter.

FITZHERBERT, C. J., and SHELLEY, J. It is clear that this action does not lie here, for it is merely spiritual. And if the defendant should justify that the plaintiff is a heretic, and should show in what point, we could not discuss whether it was heresy or not. But if it were matter wherein we could decide the main thing, as thief, or traitor, or the like, for such words an action would lie here, since we have cognizance of what is treason or felony.

¹ See also Y. B. 12 Hen. VII. fol. 22, pl. 2.

"Note by BROMLEY, PORTMAN, BROOKE and STAMFORD, clearly that one shall have an action on the case against another who called him a thief and traitor generally, or villein, for he may be damaged as much by these general words as by a detailed statement. But yet, by Brooke, in ancient times the law was not so, but now it is as above said." Anon. (1554) Dal. 17 pl. 7. — ED.

DAVIS v. MILLER,

IN THE KING'S BENCH, TRINITY TERM, 1741 OR 1742.

[Reported in 2 *Strange*, 1169.]

THESE words, "You cheated the lawyer of his linen, and stood bawd to your daughter, to make it up with him; you cheat everybody; you cheated me of a sheet; you cheated Mr. Saunders, and I will let him know it," — were held not actionable, without a *colloquium* of the plaintiff's trade or profession.¹

WEBB v. BEAVAN.

IN THE QUEEN'S BENCH DIVISION, MAY 10, 1883.

[Reported in 11 *Queen's Bench Division*, 609.]

DEMURRER to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The plaintiff claimed £500 damages.

Demurrer, on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

W. H. Nash, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely. He referred to *Odgers on Libel and Slander*, p. 54.

Hammond Chambers, contra, contended that, according to the earlier authorities, the test, in ascertaining whether words were actionable *per se*, was whether the offence imputed was punishable corporally or by fine, and that it was not necessary to allege that the words imputed

¹ *Anon.*, Dall. 45-35; *Anon.*, Moore, 29; *George's Case*, Cro. Eliz. 95; *Somerstailer v. —*, Gold. 125-12; *— v. Gilbert*, Ow. 47; *Middlemore's Case*, 3 Leon. 17; *Gittings v. Redserve*, Hutt. 13; *Walcot v. Hind*, Hutt. 14; *Ludwell v. Hole*, Stra. 696; *Bellamy v. Barker*, Stra. 304; *Osborn v. Poole*, Ld. Ray. 236; *Welden v. Johnson*, 1 Sid. 48; *Tiverton v. —*, W. Jones, 308; *Killick v. Barnes*, 2 Bulst. 138; *Hopton v. Baker*, 2 Bulst. 228; *Tut v. Kerton*, 1 Bulst. 172 *Accord*.

Anon., Dall., 48-26 *Contra*. — *Ed*.

an indictable offence. He cited Com. Dig. tit. Action on the Case for Defamation, D. 5 and 9; *Curtis v. Curtis*.¹

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression, "indictable offence" seems to have crept into the text-books, but I think the passages in Comyns' Digest are conclusive to show that words which impute any criminal offence are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander. *Demurrer overruled*.²

¹ 10 Bing. 477.

² There is great diversity of opinion as to what words, imputing the commission of a crime, are actionable *per se*. The authorities may be classified as follows:—

I. Words imputing a criminal offence punishable corporally.

In *Hawes's Case*, March, 113 (Speaking against common prayer); *Heake v. Moulton*, Yelv. 90; *Walden v. Mitchell*, 2 Ventr. 265; *Scoble v. Lee*, 2 Show. 32 (Regrating); *McCabe v. Foot*, 15 L. T. Rep. 115; *Elliott v. Ailsberry*, 2 Bibb. 473 (Fornication); *M'Gee v. Wilson*, Litt. S. C. 187 (Unchastity); *Miles v. Wimp*, 10 B. Mon. 417 (*semble*); *Buck v. Hersey*, 31 Me. 558 (Drunkenness); *Wagaman v. Byers*, 17 Md. 183 (Adultery); *Birch v. Benton*, 26 Mo. 153 (Whipping one's wife); *Speaker v. McKenzie*, 26 Mo. 255 (Whipping one's mother); *Billings v. Wing*, 7 Vt. 439 ("He snaked his mother out of doors by the hair of her head; it was the day before she died"), the words uttered were held not to give a right of action, since they imputed crimes punishable only by fine, or by imprisonment merely as a consequence of the non-payment of the fine.

II. Words imputing a criminal offence and involving moral turpitude. *Frisbie v. Fowler*, 3 Conn. 709; *Hoag v. Hatch*, 23 Conn. 585; *Page v. Merwin*, 54 Conn. 426; *Kennenberg v. Neff*, 74 Conn. 62; *Reitan v. Goebel*, 33 Minn. 151.

III. Words imputing a criminal offence, involving moral turpitude and punishable corporally. *Redway v. Gray*, 31 Vt. (qualifying *Billings v. Wing*, 7 Vt. 439); *Murray v. McAllister*, 38 Vt. 167.

IV. Words imputing a criminal offence involving disgrace. *Miller v. Parish*, 8 Pick. 384; *Brown v. Nickerson*, 5 Gray, 1; *Kenney v. McLaughlin*, 5 Gray, 3; *Ranger v. Goodrich*, 17 Wis. 78; *Mayer v. Schleichter*, 29 Wis. 646; *Gibson v. Gibson*, 43 Wis. 23; *Geary v. Bennett*, 53 Wis. 444.

V. Words imputing a criminal offence subjecting the offender to infamous punishment. *Shipp v. McCraw*, 3 Murph. 463; *Brady v. Wilson*, 4 Hawks. 94; *Skinner v. White*, 1 Dev. & Bat. 471; *Wall v. Hoskins*, 5 Ired. 177; *Wilson v. Tatum*, 8 Jones (N. Ca.), 300; *McKee v. Wilson*, 87 N. Ca. 300; *Harris v. Terry*, 98 N. Ca. 131.

VI. Words imputing an *indictable* offence involving moral turpitude, or subjecting the offender to an infamous punishment. See *Brooker v. Coffin*, *infra*, and cases cited.

VII. Words imputing an *indictable* offence punishable corporally. *Griffin v. Moore*, 43 Md. 246; *Shafer v. Ahalt*, 48 Md. 171; *Birch v. Benton*, 26 Mo. 153; *Curry v. Collins*, 37 Mo. 324; *Bundy v. Hart*, 46 Mo. 460; *Lewis v. McDaniel*, 82 Mo. 577; *Houston v. Woolley*, 37 Mo. Ap. 15, 24. — Ed.

BROOKER v. COFFIN.

SUPREME COURT OF JUDICATURE, NEW YORK, NOVEMBER, 1809.

[Reported in 5 Johnson, 188.]

SPENCER, J., delivered the opinion of the court.¹ The first count is for these words, "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action without alleging special damages.² By the statute (1 R. L. 124), common prostitutes are adjudged disorderly persons, and are liable to commitment by any justice of the peace, upon conviction, to the bridge-well or house of correction, to be kept at hard labor for a period not exceeding sixty days, or until the next general sessions of the peace. It has been supposed that, therefore, to charge a woman with being a common prostitute, was charging her with such an offence as would give an action for the slander. The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable;³

¹ Only the opinion of the court is given. — Ed.

² By 54 & 55 Vict. c. 51, words which impute unchastity or adultery to any woman or girl are actionable, without special damage.

³ This rule has been approved in the following cases: Pollard v. Lyon, 91 U. S. 225; Perdue v. Burnett, Minor, 138; Dudley v. Horn, 21 Ala. 379; Hillhouse v. Peck, 2 St. & P. 395; Heath v. Devaughn, 37 Ala. 677; Kinney v. Hosea, 3 Harring. 77; Pledger v. Hathcock, 1 Ga. 550; Giddens v. Mink, 4 Ga. 364; Richardson v. Roberts, 23 Ga. 215; Burton v. Burton, 3 Greene, 316; Halley v. Gregg, 74 Iowa, 563; St. Martin v. Desnoyer, 1 Minn. 156; West v. Hanrahan, 28 Minn. 385; Chaplin v. Lee, 18 Neb. 440; Hendrickson v. Sullivan, 28 Neb. 329; McCuen v. Ludlum, 2 Harr. 12; Johnson v. Shields, 25 N. J. 116; Widrig v. Oyer, 13 Johns. 124; Martin v. Stilwell, 13 Johns. 275; Alexander v. Alexander, 9 Wend. 141; Case v. Buckley, 15 Wend. 327; Bissell v. Cornell, 24 Wend. 354; Demarest v. Haring, 6 Cow. 76; Young v. Miller, 3 Hill, 21; Wright v. Paige, 3 Keyes, 581, 3 Trans. Ap. 134 s. c.; Crawford v. Wilson, 4 Barb. 504; Johnson v. Brown, 57 Barb. 118; Quinn v. O'Gara, 2 E. D. Sm. 388; Dial v. Holter, 6 Oh. St. 228; Alfele v. Wright, 17 Oh. St. 238; Hollingsworth v. Shaw, 19 Oh. St. 430; Davis v. Brown, 27 Oh. St. 326; Davis v. Sladden, 17 Oreg. 259; Andres v. Koppenheaver, 3 S. & R. 255; Davis v. Carey, 141 Pa. 314; Lodge v. O'Toole, 20 R. I. 405; Gage v. Shelton, 3 Rich. 242; Smith v. Smith, 2 Sneed, 473; McAnally v. Williams, 3 Sneed, 26; Poe v. Grever, 3 Sneed, 664; Payne v. Tancil, 98 Va. 262. — Ed.

and Baron Comyns considers the test to be, whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F, 20. There is not, perhaps, so much uncertainty in the law upon any subject as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they therefore adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective.

The defendant must, therefore, have judgment.

FOWLER v. DOWDNEY.

AT NISI PRIUS, CORAM LORD DENMAN, C. J., MARCH 2, 1838.

[Reported in 2 Moody & Robinson, 119.]

SLANDER, for saying of the plaintiff, "He is a returned convict."

Erle contended that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment.

LORD DENMAN, C. J. My opinion is that these words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported. That is, I think, the plain meaning of the words as set out in the declaration; they import, to be sure, that the punishment has been suffered, but still the obloquy remains.¹

Verdict for the plaintiff. Damages, 1s.

HANKINSON v. BILBY.

IN THE EXCHEQUER, JANUARY 28, 1847.

[Reported in 16 Meeson & Welsby, 442.]

CASE. The declaration stated that the defendant, in the presence and hearing of divers subjects, falsely and maliciously charged the plaintiff,

¹ Gainford v. Tuke, Cro. Jac. 536; Boston v. Tatam, Cro. Jac. 623; Beaver v. Hides, 2 Wils. 300; Stewart v. Howe, 17 Ill. 71; Wiley v. Campbell, 5 Monr. 396; Krebs v. Oliver, 12 Gray, 239; Johnson v. Dicken, 25 Mo. 580; Van Ankin v. Westfall, 14 Johns. 233; Ship v. McCraw, 8 Murphy, 463; Smith v. Stewart, 5 Pa. 372; Beck v. Stitzel, 21 Pa. 524; Poe v. Grever, 3 Sneed (Tenn.), 664 Accord.

Compare Carpenter v. Tarrant, C. t. Hardw. 339; French v. Creath, Breece, 12; Barclay v. Thompson, 2 P. & W. 148. — ED.

a gardener, with being a thief. Plea: Not guilty. At the trial, before Rolfe, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the Kingsland turnpike-gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the by-standers would understand that charge to be conveyed by them. Verdict for the plaintiff for £5.

Humfrey now moved for a new trial, on the ground of misdirection.¹

ALDERSON, B. In this case, had there been no by-standers who could understand the words as imputing felony, or who knew all about the affair respecting which they were uttered, the judge's direction would have been wrong, for it would then be *damnum absque injuria*, the *injuria* being the having no lawful occasion to impute felony.

PARKE, B. The witness appears to have been well acquainted with the affair to which the words related. If the by-standers were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if by-standers may fairly understand them in a sense and manner injurious to the party to whom they relate, *e. g.* that he was a felon.

Some doubt being suggested as to the facts proved, the court conferred with Rolfe, B.; and the next day,

POLLOCK, C. B., said, We find from my Brother Rolfe that there were several by-standers who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.

*Rule refused.**

¹ The case has been much abridged. — ED.

² *Phillips v. Barber*, 7 Wend. 439 *Accord*.

A lunatic is liable for torts generally, *supra*, 56, and also for a libel, *Mordaunt v. Mordaunt*, 39 L. J. Pr. & M. 57, 59. But it is another illustration of the rule of the principal case that defamatory words spoken by a lunatic whose insanity was obvious or known to all the hearers, are not actionable. *Yeates v. Reed*, 4 Blackf. 463; *Irvine v. Gibeon*, 117 Ky. 306; *Dickinson v. Barber*, 9 Mass. 225, 227; *Bryant v. Jackson*, 6 Humph. 199. So also of words spoken and understood as a jest. *Donoghue v. Hayes*, 365. Drunkenness is no defence. *Kendrick v. Hopkins Cary*, 133; *Gates v. Meredith*, 7 Ind. 440.

The old rule of construing defamatory statements in *mitiori sensu* was long ago exploded. See *Odgers v. Lib. & Sl.* (2d ed.), 93-97. — ED.

H. P. HANSON v. GLOBE NEWSPAPER COMPANY.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1893.

[159 *Massachusetts Reports*, 293.]

KNOWLTON, J.¹ The defendant published in its newspaper an article describing the conduct of a prisoner brought before the Municipal Court of Boston, and the proceedings of the court in the case, designating him as "H. P. Hanson, a real estate and insurance broker of South Boston." He was, in fact, a real estate and insurance broker of South Boston, and the article was substantially true, except that he should have been called A. P. H. Hanson instead of H. P. Hanson. The plaintiff, H. P. Hanson, is also a real estate and insurance broker in South Boston, and in writing the article the reporter used his name by mistake.² The justice of the Superior Court, before whom the case was tried, without a jury, "found as a fact that the alleged libel declared on by the plaintiff was not published by the defendant or concerning the plaintiff," and the only question in the case is whether this finding was erroneous as matter of law.

In every action of this kind the fundamental question is, What is the meaning of the author of the alleged libel or slander, conveyed by the words used interpreted in the light of all the circumstances? The reason of this is obvious. Defamatory language is harmful only as it purports to be the expression of the thought of him who uses it. In determining the effect of a slander the questions involved are, What is the thought intended to be expressed, and how much credit should be given to him who expresses it? The essence of the wrong is the expression of what purports to be the knowledge or opinion of him who utters the defamatory words, or of some one else whose language he repeats. His meaning, to be ascertained in a proper way, is what gives character to his act, and makes it innocent or wrongful. The damages depend chiefly upon the weight which is to be given to his expression of his meaning, and all the questions relate back to the ascertainment of his meaning.

In the present case we are concerned only with the meaning of the defendant in regard to the person to whom the language of the published article was to be applied, and the question to be decided is, How may his meaning legitimately be ascertained? Obviously, in the first

¹ A portion of the opinions is omitted. — Ed.

² The article was as follows: "He Waxed Eloquent. H. P. Hanson fined ten dollars for refusing payment of car fare. . . . H. P. Hanson, a real estate and insurance broker of South Boston, emerged from the seething mass of humanity that filled the dock and indulged in a wordy bout with policeman Hogan, who claimed to have arrested Hanson on the charge of evading car fare and being drunk at the same time. The judge agreed that the prisoner was sober, but on the charge of evasion of car fare the evidence warranted the fining of the eloquent occupant of the dock ten dollars without costs, which he paid."

place, from the language used; and in construing and applying the language, the circumstances under which it was written and the facts to which it relates are to be considered, so far as they can readily be ascertained by those who read the words, and who attempt to find out the meaning of the author in regard to the person of whom they were written. It has often been said that the meaning of the language is not necessarily that which it may seem to have to those who read it as strangers, without knowledge of facts and circumstances which give it color and aid in its interpretation, but that which it has when read in the light of events which have relation to the utterance or publication of it.

For the purposes of this case it may be assumed, in favor of the plaintiff, that if the language used in a particular case, interpreted in the light of such events and circumstances attending the publication of it as could readily be ascertained by the public, is free from ambiguity in regard to the person referred to, and points clearly to a well known person, it would be held to have been published concerning that person, although the defendant should show that through some mistake of fact, not easily discoverable by the public, he had designated in his publication a person other than the one whom he intended to designate. It may well be held that where the language, read in connection with all the facts and circumstances which can be used in its interpretation, is free from ambiguity, the defendant will not be permitted to show that through ignorance or mistake he said something, either by way of designating the person, or making assertions about him, different from that which he intended to say; but his true meaning should be ascertained, if it can be, with the aid of such facts and circumstances attending the publication as may easily be known by those of the public who wish to discover it.

Whether the defendant should ever be permitted to state his undisclosed intention in regard to the person of whom the words are used, may be doubtful. If language purporting to be used of only one person would refer equally to either of two different persons of the same name, and if there were nothing to indicate that one was meant rather than the other, there is good reason for holding that the defendant's testimony in regard to his secret intention might be received, but perhaps such a case is hardly supposable. Odgers, in his book on Libel and Slander, at page 129, says: "So, if the words spoken or written, though plain in themselves, apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication, and of all the surrounding circumstances affecting the relation between the parties, and also any statement or declaration made by the defendant as to the person referred to." In *Regina v. Barnard*,¹ when it was uncertain whether the libel referred to the complainant or not, and when the language was applicable to him, Lord Chief Justice Cockburn held the affidavit of the writer that he did not mean

¹ 43 J. P. 137.

him, but some one else, to be a sufficient reason for refusing process. In *De Armond v. Armstrong*,¹ evidence was received of what the witnesses understood in regard to the person referred to. In *Smart v. Blanchard*,² it is stated that extrinsic evidence is to be received "to show that the defendant intended to apply his remarks to the plaintiff," when his meaning is doubtful. *Goodrich v. Davis*,³ and *Miller v. Butler*,⁴ are of similar purport. See also *Barwell v. Adkins*,⁵ *Knapp v. Fuller*,⁶ *Commonwealth v. Morgan*.⁷

If the defendant's article had contained anything libellous against A. P. H. Hanson, there can be no doubt that he could have maintained an action against the defendant for this publication. The name used is not conclusive in determining the meaning of the libel in respect to the person referred to; it is but one fact to be considered with other facts upon that subject. Fictitious names are often used in libels, and names similar to that of the person intended, but differing somewhat from it. A. P. H. Hanson could have shown that the description of him by name, residence, and occupation was perfect, except in the use of the initials "H. P." instead of "A. P. H.," that the article referred to an occasion on which he was present, and gave a description of conduct of a prisoner, and of proceedings in court, which was correct in its application to him and to no one else. The internal evidence when applied to facts well known to the public would have been ample to show that the language referred to him, and not to the person whose name was used.

So, in the present suit, the court had no occasion to rely on the testimony of the writer as to the person to whom the language was intended to apply. The language itself, in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name H. P. Hanson was used by mistake. As the evidence showed that the words were published of and concerning A. P. H. Hanson, the finding that they were not published of the plaintiff followed of necessity. The article was of such a kind that it referred, and could refer, to one person only; when that person was ascertained, it might appear that the publication as against him was or was not libellous, and his rights, if he brought a suit, would depend upon the finding in respect to that. No one else would have a cause of action, even if, by reason of identity of name with that used in the publication, he might suffer some harm. For illustration, suppose a libel is written concerning a person described as John Smith of Springfield. Suppose there are five persons in Springfield of that name. The language refers to but one. When we ascertain by legitimate evidence to which one the words are intended to apply, he can maintain an action. The other persons of the same name cannot recover damages for a libel merely because of their misfortune in having a name like that of the person libelled.

¹ 37 Ind. 35.² 42 N. H. 137.³ 11 Met. 473, 480, 484, 485.⁴ 6 Cush. 71.⁵ 1 M. & G. 807.⁶ 55 Vt. 311.⁷ 107 Mass. 199, 201.

Or, if the defendant can justify by proving that the words were true, and published without malice, he is not guilty of a libel, even if, written of other persons of the same name of whose existence very likely he was ignorant, the words would be libellous; otherwise, one who has published that which by its terms can refer to but one person, and be a libel on him only, might be responsible for half a dozen libels on as many different persons, and one who has justifiably published the truth of a person might be liable to several persons of the same name of whom the language would be untrue. The law of libel has never been extended, and should not be extended, to include such cases.

Whether there should be a liability founded on negligence in any case when the truth is published of one to whom the words, interpreted in the light of accompanying circumstances easily ascertainable by those who read them, plainly apply; and where, by reason of identity of names, or similarity of names and description, a part of the public might think them applicable to another person of whom they would be libellous, is a question which does not arise on the pleadings in this case. So far as we are aware, no action for such a cause has ever been maintained. It is ordinarily to be presumed, although it may not always be the fact, that those who are enough interested in a person to be affected by what is said about him, will ascertain, if they easily can, whether libellous words which purport to refer to one of his name were intended to be applied to him or to some one else.

The question in this case, whether the words were published of and concerning the plaintiff, was one of fact on all the evidence. Unless it appears that the matters stated in the report would not warrant a finding for the defendant, there must be judgment for him, even if the finding of fact might have been the other way. We are of opinion that the finding was well warranted, and there must be,

Judgment on the finding.

HOLMES, J. I am unable to agree with the decision of the majority of the court, and as the question is of some importance in its bearing on legal principles, and as I am not alone in my views, I think it proper to state the considerations which have occurred to me.

Those words [H. P. Hanson, a real estate and insurance broker of South Boston] describe the plaintiff, and no one else. The only ground, then, on which the matters alleged of and concerning that subject can be found not to be alleged of and concerning the plaintiff, is that the defendant did not intend them to apply to him, and the question is narrowed to whether such a want of intention is enough to warrant the finding, or to constitute a defence, when the inevitable consequence of the defendant's acts is that the public, or that part of it which knows the plaintiff, will suppose that the defendant did use its language about him.

On general principles of tort, the private intent of the defendant

would not exonerate it. It knew that it was publishing statements purporting to be serious, which would be hurtful to a man if applied to him. It knew that it was using as the subject of those statements words which purported to designate a particular man, and would be understood by its readers to designate one. In fact, the words purported to designate, and would be understood by its readers to designate, the plaintiff. If the defendant had supposed that there was no such person, and had intended simply to write an amusing fiction, that would not be a defence, at least unless its belief was justifiable. Without special reason, it would have no right to assume that there was no one within the sphere of its influence to whom the description answered. So, when the description which points out the plaintiff is supposed by the defendant to point out another man whom in fact it does not describe, the defendant is equally liable as when the description is supposed to point out nobody. On the general principles of tort, the publication is so manifestly detrimental that the defendant publishes it at the peril of being able to justify it in the sense in which the public will understand it.

A man may be liable civilly, and formerly, at least by the common law of England, even criminally, for publishing a libel without knowing it. *Curtis v. Mussey*,¹ *Commonwealth v. Morgan*,² *Dunn v. Hall*,³ *Rex v. Walter*,⁴ *Rex v. Gutch*.⁵ See also *Rex v. Cuthell*.⁶ And it seems he might be liable civilly for publishing it by mistake, intending to publish another paper. *Mayne v. Fletcher*.⁷ *Odgers, Libel and Slander*, (2d ed.) 5. So, when by mistake the name of the plaintiff's firm was inserted under the head "First Meetings under the Bankruptcy Act," instead of under "Dissolution of Partnerships." *Shepherd v. Whitaker*.⁸ So a man will be liable for a slander spoken in jest, if the bystanders reasonably understand it to be a serious charge. *Donoghue v. Hayes*.⁹ Of course it does not matter that the defendant did not intend to injure the plaintiff, if that was the manifest tendency of his words. *Curtis v. Mussey*,¹⁰ *Haire v. Wilson*.¹¹ And to prove a publication concerning the plaintiff, it lies upon him "only to show that this construction, which they've put upon the paper, is such as the generality of readers must take it in, according to the obvious and natural sense of it." *The King v. Clerk*.¹² See further *Fox v. Broderick*,¹³ *Odgers, Libel and Slander*, (2d ed.) 155, 269, 435, 638. In *Smith v. Ashley*,¹⁴ the jury were instructed that the publisher of a newspaper article written by another, and supposed and still asserted by the defendant to be a fiction, was not liable if he believed it to be so. Under the circumstances of the case, "believed" meant "reasonably believed." Even so qualified, it is questioned by Mr. Odgers if the ruling would be followed in Eng-

¹ 6 Gray, 261.² 3 Esp. 21.³ 4 Man. & Ry. 311, 312, note.⁴ 6 Gray, 261, 273.⁵ 14 Ir. C. L. 453.⁶ 107 Mass. 199.⁷ Mood. & Malk. 433.⁸ L. R. 10 C. P. 502.⁹ 9 B. & C. 643.¹⁰ 11 Met. 367.¹¹ 1 Ind. 344.¹² 27 St. Tr. 642.¹³ Hayes, 265.¹⁴ 1 Barnard, 304, 305.

land. Odgers, Libel and Slander, (1st Am. ed.) 387, (2d ed.) 638. But it has no application to this case, as here the defendant's agent wrote the article, and there is no evidence that he or the defendant had any reason to believe that H. P. Hanson meant any one but the plaintiff.

The foregoing decisions show that slander and libel now, as in the beginning, are governed by the general principles of the law of tort, and, if that be so, the defendant's ignorance that the words which it published identified the plaintiff is no more an excuse, than ignorance of any other fact about which the defendant has been put on inquiry. To hold that a man publishes such words at his peril, when they are supposed to describe a different man, is hardly a severer application of the law, than when they are uttered about a man believed on the strongest grounds to be dead, and thus not capable of being the subject of a tort. It has been seen that by the common law of England such a belief would not be an excuse. *Hearne v. Stowell*,¹ denying *Parson Prick's* case.

I feel some difficulty in putting my finger on the precise point of difference between the minority and majority of the court. I understand, however, that a somewhat unwilling assent is yielded to the general views which I have endeavored to justify, and I should gather that the exact issue was to be found in the statement that the article was one describing the conduct of a prisoner brought before the Municipal Court of Boston, coupled with the later statement that the language, taken in connection with the publicly known circumstances under which it was written, showed at once that the article referred to A. P. H. Hanson, and that the name of H. P. Hanson was used by mistake. I have shown why it seems to me that these statements are misleading. I only will add on this point, that I do not know what the publicly known circumstances are. I think it is a mistake of fact to suppose that the public generally know who was before the Municipal Criminal Court on a given day. I think it is a mistake of law to say that, because a small part of the public have that knowledge, the plaintiff cannot recover for the harm done him in the eyes of the greater part of the public, probably including all his acquaintances who are ignorant about the matter, and I also think it no sufficient answer to say that they might consult the criminal records, and find out that probably there was some error. *Blake v. Stevens*.² If the case should proceed further on the facts, it might appear that, in view of the plaintiff's character and circumstances, all who knew him would assume that there was a mistake, that the harm to him was merely nominal, and that he had been too hasty in resorting to an action to vindicate himself. But that question is not before us.

With reference to the suggestion that, if the article, in addition to what was true concerning A. P. H. Hanson, had contained matter

¹ 12 A. & E. 719, 726.

² 4 F. & F. 232, 240.

which was false and libellous as to him, he might have maintained an action, it is unnecessary to express an opinion. I think the proposition less obvious than that the plaintiff can maintain one. If an article should describe the subject of its statements by two sets of marks, one of which identified one man and one of which identified another, and a part of the public naturally and reasonably were led by the one set to apply the statements to one plaintiff, and another part were led in the same way by the other set to apply them to another, I see no absurdity in allowing two actions to be maintained. But that is not this case.

Even if the plaintiff and A. P. H. Hanson had borne the same name, and the article identified its subject only by a proper name, very possibly that would not be enough to raise the question. For, as every one knows, a proper name always purports to designate one person and no other, and although, through the imperfection of our system of naming, the same combination of letters and sounds may be applied to two or more, the name of each, in theory of law, is distinct, although there is no way of finding out which person was named but by inquiring which was meant. "*Licet idem sit nomen, tamen diversum est propter diversitatem personæ.*" Bract. fol. 190 a. *Commonwealth v. Bacon*.¹ *Cocker v. Crompton*.² *In re Cooper*.³ *Mead v. Phenix Ins. Co.*⁴ *Kyle v. Kavanagh*.⁵ *Raffles v. Wichelhaus*.⁶ Mr. Justice Morton and Mr. Justice Barker agree with this opinion.⁷

¹ 135 Mass. 521, 525.

² 1 B. & C. 489.

³ 20 Ch. D. 611.

⁴ 158 Mass. 124, 125.

⁵ 103 Mass. 356.

⁶ 2 H. & C. 906.

⁷ The opinion of the dissenting judges is supported by the decisions and *dicta* in other jurisdictions. *Butler v. Barret*, 130 Fed. 944 (*semble*); *Every Evening Co. v. Butler*, 144 Fed. 916; *Taylor v. Hearst*, 107 Cal. 262; *Hulbert v. New Co.*, 111 Iowa, 490; *Davis v. Marxhausen*, 86 Mich. 281, 108 Mich. 315 (*semble*); *Clark v. North American Co.*, 203 Pa. 346 (*semble*); *Hutchinson v. Robinson*, 21 N. S. W., L. R. (Law) 130 (*semble*).—ED.

SECTION III. (*continued.*)

(b) WORDS DISPARAGING A PERSON IN HIS TRADE, BUSINESS, OFFICE, OR PROFESSION.

LUMBY v. ALLDAY.

IN THE EXCHEQUER, HILARY TERM, 1831.

[Reported in 1 Crompton & Jervis, 301.]

ACTION for words.

The judgment of the court was now delivered by

BAYLEY, B.¹ This case came before the court upon a rule *nisi* to enter a nonsuit. The ground of motion was that the words (in slander) proved upon the trial were not actionable.

Two points were discussed upon the motion: one, whether the words were actionable or not; and the other, whether this was properly a ground of nonsuit.

The declaration stated that the plaintiff was clerk to an incorporated company, called the Birmingham and Staffordshire Gas Light Company, and had behaved himself as such with great propriety, and thereby acquired, and was daily acquiring, great gains; but that the defendant, to cause it to be believed that he was unfit to hold his situation, and an improper person to be employed by the company, and to cause him to be deprived of his situation, spoke the words complained of in the declaration, viz.: "You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores. I will have you in the 'Argus.' You have bought up all the copies of the 'Argus,' knowing you have been exposed. You may drown yourself, for you are not fit to live, and are a disgrace to the situation you hold."

The objection to maintaining an action upon these words is, that it is only on the ground of the plaintiff being clerk to the company that they can be actionable; that it is not alleged that they are spoken of him in reference to his character or conduct as clerk; that they do not, from their tenor, import that they were spoken with any such reference; that they do not impute to him the want of any qualification such as a clerk ought to have, or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of such a clerk.

The plaintiff relied on the rule laid down by De Grey, C. J., in *Onslow v. Horne*,² "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their damage." The

¹ Only the opinion of the court is given. — Ed.

² 3 Wils. 177.

same case occurs in Sir Wm. Bl. Rep. 753, and there the rule is expressed to be, "if the words be of probable ill consequence to a person in a trade or profession, or an office."¹

The objection to the rule, as expressed in both reports, appears to me to be, that the words "probably" and "probable" are too indefinite and loose, and unless they are considered as equivalent to "having a natural tendency to," and are confined within the limits, I have expressed in stating the defendant's objections, of showing the want of some necessary qualification, or some misconduct in the office, it goes beyond what the authorities warrant.

Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business. As at present advised, therefore, I am of opinion that the charge proved in this case is not actionable, because the imputation it contains does not imply the want of any of those qualities which a clerk ought to possess, and because the imputation has no reference to his conduct as clerk. I say as at present advised, for the reason which I am about to state.

The next question is, whether this is properly a ground of nonsuit; and I am of opinion that, under the circumstances of this case, it is not. The words proved are nearly all the words which the first count contains; and if the words proved are not actionable, none of the other words contained in that count are. When the general issue is pleaded to a count, it puts in issue to be tried by the jury the question, whether the facts stated in that count exist. The legal effect of those facts, whether they constitute a cause of action or not, is not properly in question. The proper mode to bring that legal effect into consideration is, before trial, to demur; after trial, to move in arrest of judgment. The duty of the judge, under whose direction the jury try questions of fact, is not to consider whether the facts charged give a ground of action, but to assist the jury in matters of law, which may arise upon the trial of those facts.

As the defendant, therefore, in this case puts in issue the allegations in the declaration, and those allegations were proved upon the trial, we are of opinion that the rule for a nonsuit ought to be discharged; and, notwithstanding the lapse of time, that there ought to be a rule *nisi* to arrest the judgment, if the defendant be advised to take such rule.

*Rule discharged.*²

¹ "We think that the rule as to words spoken of a man in his office or trade is not necessarily confined to offices and trades of the nature and duties of which the court can take judicial notice. The only limitation of which we are aware is, that it does not apply to illegal callings." — *Per* CHANNELL, B., in *Foulger v. Newcomb*, L. R. 2 Ex. 327, 330. — *Ed.*

² *Alexander v. Angle*, 1 Cr. & J. 143; *Sibley v. Tomlins*, 4 Tyrwh. 90; *Doyley v. Roberts*, 3 B. N. C. 835; *Brayne v. Cooper*, 5 M. & W. 249; *James v. Brook*, 9 Q. B. 1; *Dauncey v. Holloway*, [1901] 2 Q. B. 441; *Hogg v. Dorrah*, 2 Porter (Ala.), 212; *Oram v.*

AYRE v. CRAVEN.

IN THE KING'S BENCH, MICHAELMAS TERM, 1834.

[Reported in 2 *Adolphus & Ellis*, 2.]

ACTION for slander. The declaration alleged that the defendant in the hearing of divers persons uttered words (setting them forth) which imputed adultery to the plaintiff, a medical man.¹ On the trial, before Taunton, J., at the York spring assizes, in this year, a verdict was found for the plaintiff.

In Easter term last, *Alexander* obtained a rule calling on the plaintiff to show cause why the judgment should not be arrested.

F. Pollock, *Wightman*, and *Raines*, showed cause.

Cur. adv. vult.

LORD DENMAN, C. J., in this term (Nov. 24th), delivered the judgment of the court.

There are obvious and very good reasons for the jealousy with which the courts have always regarded actions of slander, particularly those in which no indictable offence has been imputed; but here the plaintiff states the grievance as affecting him in his business, office, or profession, without charging that any actual damage has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail to excite surprise: a clergyman having failed to obtain redress for the imputation of adultery;² and a school-mistress having been declared incompetent to maintain an action for a charge of prostitution.³ Such words were undeniably calculated to injure the success of the plaintiffs in their several professions, but, not being applicable to their conduct therein, no action lay.

The doctrine to be deduced from the older cases was recently laid down, after a full discussion, by Mr. Baron Bayley, in *Lumby v. All-day*: "Every authority which I have been able to find, either shows the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business."

In that case, accordingly, where a verdict had been recovered by the clerk of a gas company, on a declaration alleging that the defendant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him,

Franklin, 5 Blackf. 42; *Buck v. Hersey*, 31 Me. 558; *Oakley v. Farrington*, 1 Johns. Cas. 129; *Van Tassel v. Capron*, 1 Den. 250; *Ireland v. McGarviah*, 1 Sandf. 155; *Chomley v. Watson*, [1907] Vict. L. R. 502 *Accord*.

Compare *Ware v. Clowney*, 24 Ala. 707; *Butler v. Howes*, 7 Cal. 87; *Fowles v. Bowen*, 30 N. Y. 20. — Ed.

¹ The statement is abridged, and the arguments are omitted. — Ed.

² *Parrat v. Carpenter*, Noy, 64; Cro. El. 502 s. c.

³ *Per Twisden, J.*, in *Wharton v. Brook*, 1 Vent. 21.

"You are unfit to hold your situation," and then imputed incontinence as the reason of his unfitness, the Court of Exchequer thought the judgment ought to be arrested.

In the present case, much doubt was entertained whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested. *Rule absolute.*¹

GALLWEY v. MARSHALL.

IN THE EXCHEQUER, DECEMBER 8, 1853.

[Reported in 9 *Exchequer Reports*, 294.]

THE declaration stated that the defendant in conversation imputed incontinency to the plaintiff, who was in holy orders as a clergyman of the Church of England.

Demurrer and joinder therein.

The judgment of the court was now delivered by

POLLOCK, C. B. (After stating the pleadings, his Lordship proceeded :) We should have had no doubt in the present case of the plaintiff's right to recover, if the declaration had averred that the plaintiff was beneficed, or was in the actual receipt of professional temporal emolument, as a preacher, lecturer, or the like, at the time of the speaking of the words, as the charge, if true, would have been a cause of deprivation of the benefice in the first case, and also of degradation from orders, and consequently of the loss of the emoluments in the other cases. This point was decided in *Dr. Sibthorpe's Case*,² *Dod v. Robinson*,³ in effect overruling the case relied upon for the defendant, *Parrat v. Carpenter*;⁴ in which case the court held that the slander was examinable in the spiritual court only; and the reason assigned in *Dod v. Robinson* is, that the matter charged is good cause to have him degraded, whereby he should lose his freehold, which is a temporal damage to him. And the reason given in 1 *Roll. Abr.* is

¹ See *Morasse v. Brooks*, 151 Mass. 567, 576. — Ed.

² *W. Jones*, 366.

³ *AL* 63; *Sty.* 49 s. c.

⁴ *Cro. EL* 502.

that he could have temporal damage by the speaking of slander. To the same effect is the *dictum* of Lord Holt, as to an imputation of a want of learning being actionable, in *Coxeter v. Parsons*.¹ In the case of *Dod v. Robinson*,² the words imputed to the plaintiff not only incontinence, but preaching false doctrine, both of which were causes of degradation, and consequently of deprivation; and the latter charge implied misconduct in his office. But we think it clear that the charge of incontinence made against a beneficed clergyman, and alleged to have been committed whilst he is beneficed, is of that nature that necessarily tends to do him injury in his professional character, and to endanger him in the enjoyment of his office of parson, and is therefore actionable.³ In this respect, the charge differs from that which was the subject of the second count in the case of *Pemberton v. Colls*.⁴

But in the absence of any averment of the plaintiff having any office or employment of temporal profit, we are not satisfied that this action will lie. There is no authority to be found that we are aware of, in support of the position that it will, where there is no actual damage; and we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. The words are actionable in the spiritual court, as they import incontinency, and incontinency may be punished there, and there only; and if the plaintiff be in orders merely, and not being injured in respect of temporal profit, the only remedy appears to be in the ecclesiastical court.

If incontinence was a crime punishable by temporal punishments, the words spoken might fall within the ordinary rule, that words are actionable which charge an offence liable to temporal punishment. But the statute 1 Hen. VII. c. 4, gives jurisdiction to punish incontinence in ecclesiastics to the archbishop, bishops, and ordinaries only. The Clergy Discipline Act, 3 & 4 Vict. c. 86, does not make such an offence punishable by temporal punishment. Both of these statutes are for giving additional power to ecclesiastical tribunals only.

We therefore think that we ought to hold that the action will not lie.

PLATT, B., added. I must own that during the argument I entertained considerable doubt on the subject. Incontinency is a sufficient ground for deprivation *a beneficio* or *ab officio*, the latter being applicable to the case of an incontinent clerk in orders merely, and without a benefice. It therefore seemed to me, that if the offence imputed was, if true, a sufficient ground for depriving the clergyman of his status as

¹ 1 Ld. Ray. 423, 1 Salk. 692.

² Al. 63, Sty. 49.

³ *Bishop of Norwich v. Prickett*, Cro. Eliz. 1 (Heterodoxy in religion); *Payne v. Beumorris*, 1 Lev. 248 (Incontinence); *Pope v. Ramsey*, 1 Keb. 542 (Knave, &c.); *Chaddock v. Briggs*, 13 Mass. 247 (Drunkenness); *Ritchie v. Widener*, 59 N. J. 290; *Demarest v. Haring*, 6 Cow. 78 (Incontinence); *Potter v. N. Y. Journal*, 68 N. Y. Ap. Div. 98; *Hayner v. Cowden*, 27 Oh. St. 292 (Drunkenness); *McMillan v. Birch*, 1 Binney, 178 (Drunkenness); *Starr v. Gardner*, 6 Up. Can. Q. B. O. S. 512 (Incontinence); but see, *contra*, *Breeze v. Sails*, 23 Up. Can. Q. B. 94 (Incontinence) *Accord*.

Parrat v. Carpenter, Cro. El. 502; *Nicholson v. Lyne*, Cro. El. 94; *Anon.*, Sty. 49 *Contra*. — Ed.

⁴ 10 Q. B. 461.

such, the slander would be actionable *per se*, inasmuch as the degradation from his order would be a temporal damage. If the slander had been of a barrister, imputing to him such misconduct as would justify his being disbarred, it might be a good cause of action against the slanderer, although the slandered person never held a brief, or his profits were merely honorary. Other instances may be readily suggested; but I do not feel so strong upon the point as to induce me to differ from the other members of the court.

Judgment for the defendant

JONES v. LITTLER.

IN THE EXCHEQUER, JANUARY 16, 1841.

[Reported in 7 Meeson & Welsby, 423.]

SLANDER. The declaration stated that the plaintiff was a brewer, and that the defendant falsely and maliciously spoke and published of and concerning him in the way of his trade as a brewer the false, scandalous, malicious, and defamatory words following: "I'll" (meaning that he, the defendant, would) "bet £5 to £1, that Mr. Jones" (meaning the plaintiff) "was in a sponging-house for debt within the last fortnight, and I can produce the man who locked him up; the man told me so himself." Whereupon the said Henry Pye then asked the defendant, "Do you mean to say that Mr. Jones, brewer, of Rose Hill" (meaning and describing the plaintiff), "has been in a sponging-house within this last fortnight for debt?" and thereupon the defendant then replied to the said Henry Pye, and the said other persons then present, "Yes, I do."

The jury having returned a verdict for the plaintiff, the court granted a rule to show cause why there should not be a new trial, on a suggestion that the learned judge ought to have left it as a question to the jury whether the words were spoken of the plaintiff in the way of his trade, and did not. .

PARKE, B. It is quite clear that this rule ought to be discharged, for the only ground on which it was granted has failed, inasmuch as the learned judge did leave the question to the jury, whether the words were spoken of the plaintiff in his trade; and, indeed, it is plain that the words were so used, from the fact that in the conversation in question the plaintiff was spoken of as a brewer. Independently of that, however, and even if they were spoken of him in his private character, I think the case of *Stanton v. Smith*¹ is an authority to show that the words would have been actionable, because they must necessarily affect him in his trade. It is there said, "We were

¹ 2 Ld. Raym. 1480.

all of opinion that such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and therefore that they were actionable." That case is distinguishable from *Ayre v. Craven* and *Doyley v. Roberts*.¹ In the latter of those cases the words were not spoken of the plaintiff in his business of an attorney; and in the former it did not appear in what manner the immorality was connected with the plaintiff's profession of a physician; and it was possible that such imputations of incorrect conduct, out of the line of their respective professions, might not injure their professional characters. But this case is distinguishable, because here the imputation is that of insolvency, which must be injurious; for if a tradesman be incapable of paying all his debts, whether in or out of trade, his credit as a tradesman, which depends on his general solvency, must be injured. The case of *Stanton v. Smith*, as it appears to me, is good law, notwithstanding the observations of Coltman, J., in *Doyley v. Roberts*.

ALDERSON and ROLFE, BB., concurred.

*Rule discharged.*²

SECOR v. HARRIS.

SUPREME COURT, NEW YORK, SEPTEMBER, 1854.

[Reported in 18 *Barbour*, 425.]

MOTION by the plaintiff for a new trial, upon a bill of exceptions.

F. U. Fanno, for the plaintiff. *W. B. Hawes*, for the defendant.

MASON, J. This is an action for slander. Upon the trial of the cause the plaintiff proved the following words, which were also alleged in the complaint: "Doctor Secor killed my children." "He gave them teaspoonful doses of calomel, and they died." "Dr. Secor gave them teaspoonful doses of calomel, and it killed them; they did not live long after they took it. They died right off,—the same day." The plaintiff was proved to be a practising physician, and the evidence shows that he had practised in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and

¹ 3 Bing. N. Ca. 835.

² *Kempe's Case*, Dy. 72, pl. 6, Ames, Cas. Torts (1st ed.), 706 and n. 1; *Stanton v. Smith*, 2 Ld. Ray. 1480; *Brown v. Smith*, 13 C. B. 596; *Traynor v. Sieloff*, 62 Minn. 420; *Simons v. Burnham*, 102 Mich. 189; *Davis v. Ruff*, Cheeves, 17 *Accord*.

Barnes v. Trundy, 31 Me. 321; *Redway v. Gray*, 31 Vt. 292 *Contra*.

See *Bell v. Thatcher*, Freem. 276; *Bryant v. Loxton*, 11 Moo. 344; *Taylor v. Church*, 1 E. D. Smith, 287; *Fowles v. Bowen*, 30 N. Y. 20. — Ed.

took them from the consideration of the jury. These words, spoken of the plaintiff as a physician, are actionable *per se*, whatever may be said upon the question, whether they impute a criminal offence. They do not impute a criminal offence, unless there is evidence, arising from the quantity of the calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of such tender years full teaspoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children, in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question, whether the defendant did not intend to impute to the plaintiff, by these words, a criminal offence. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them teaspoonful doses of calomel. The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine, as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. Starkie on Slander, 100, 110, 115, 10, 12; Martyn v. Burlings;¹ Bacon's Abr. title Slander, B; Watson v. Van Derlash;² Tutler v. Alwin;³ Smith v. Taylor;⁴ Sumner v. Utley.⁵ I am aware that it was held, in the case of Poe v. Mondford,⁶ that it is not actionable to say of a physician, "He hath killed a patient with physic;" and that, upon the strength of the authority of that case, it was decided in this court in Foot v. Brown,⁷ that it was not actionable to say of an attorney or counsellor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of Poe v. Mondford is repudiated in Bacon's Abr. as authority, and cases are referred to as holding a contrary doctrine (vol. ix. pages 49, 50). The cases of Poe v. Mondford, and of Foot v. Brown, were reviewed by the Supreme Court of Connecticut, in the case of Sumner v. Utley,⁸ with most distinguished

¹ Cro. Eliz. 589.² Hetl. 69.³ 11 Mod. R. 221.⁴ 1 New R. 196.⁵ 7 Conn. R. 257.⁶ Cro. El. 620.⁷ 8 Johns. 64.⁸ 7 Conn. R. 257.

ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held, that words are actionable in themselves, which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskilfulness. To the same effect is the case of *Johnson v. Robertson*,¹ where it was held that the following words spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutler v. Alwin*,² where it was held to be actionable to say of an apothecary, that "he killed a patient with physic." See also 3 Wilson's R. 186; Bacon's Abr. title Slander, letter B, 2, vol. ix. page 49 (Bouv. ed.). The cases of *Poe v. Mondford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American States, while the case of *Poe v. Mondford* seems to have been repudiated in England; and I agree with Clinch, J., that the reason upon which that case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskilfulness; and where charges are made against a physician that fall within this class of cases, they are not actionable, without proof of special damages.³ 7 Conn. R. 257. It is equally true, that a single act of a physician may evince gross ignorance, and such a total want of skill, as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable *per se*. 7 Conn. R. 257. The rule may be laid down as a general one that, when the charge implies gross ignorance and unskilfulness in his profession, the words are actionable *per se*. This is upon the ground that the law presumes damage to result, from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. Starkie on Slander, 581. It was well said by the learned Chief Justice Hosmer, in *Sumner v. Utley*,⁴ that, "As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By con-

¹ 8 Porter's R. 486.

² 11 Mod. R. 221.

³ *Sumner v. Utley*, 7 Conn. 257; *Garr v. Selden*, 6 Barb. 416; *Rodgers v. Kline*, 56 Miss. 808; *Lynde v. Johnson*, 39 Hun, 5 *Accord.* — Ed.

⁴ 7 Conn. 257.

fining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then, the mistaking of an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence; and then the proof will always fall short of the mischief. In the mean time the reputation of the calumniated person languishes and dies; and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof: *Starkie on Slander*, 581; in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practise." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the consideration of the jury, and a new trial must be granted; costs to abide the event of the action.

CRIPPEN, J., concurred. SHANKLAND, J., dissented.

*New trial granted.*¹

¹ *Johnson v. Robertson*, 8 Port. (Ala.) 486; *Sumner v. Utley*, 7 Conn. 257; *Lovejoy v. Whitcomb*, 174 Mass. 586; *Freisinger v. Moore*, 65 N. J. 236; *Mattice v. Wilcox*, 147 N. Y. 624; *Krug v. Pitass*, 162 N. Y. 154; 163 N. Y. 600; *Lynde v. Johnson*, 39 Hun, 12; *Hollingsworth v. Spectator Co.*, 49 N. Y. Ap. Div. 16; *McIntyre v. Weinert*, 195 Pa. 52; *Holland v. Flick*, 212 Pa. 251; *Gauvreau v. Superior Co.*, 62 Wis. 403 *Accord.* See *Watson v. Vanderlash*, Hetl. 71; *Edsall v. Russell*, 4 M. & Gr. 1090.

Foot v. Brown, 8 Johns. 64 *Contra.* See *Camp v. Martin*, 23 Conn. 89; *Pratt v. Pioneer Co.*, 35 Minn. 251.

The imputation of misconduct in an office of honor but not of profit is actionable *per se*, *Booth v. Arnold*, [1895] 1 Q. B. 571; *Livingston v. McCartin*, [1907] Vict. L. R. 48. But the rule is otherwise, according to *Alexander v. Jenkins*, [1892] 1 Q. B. 797, as to the imputation of unfitness for such an office. — ED.

SECTION III. (*continued.*)

'(c) WORDS IMPUTING A LOATHSOME DISEASE.

TAYLOR v. PERKINS.

IN THE KING'S BENCH, HILARY TERM, 1607.

[*Reported in Croke, James, 144.*]

ACTION for these words: "Thou art a leprous knave." It was demurred upon the declaration, because the defendant conceived an action lay not for these words. But upon the first motion all the court held, that the action well lay, for they are as well actionable as if he had said, "Thou wast laid of the pox." Wherefore, without argument, it was adjudged for the plaintiff.

SMITH v. HOBSON.

IN THE KING'S BENCH, TRINITY TERM, 1647.

[*Reported in Style, 112.*]

SMITH, an innkeeper in Warwick, brought an action upon the case against Hobson for speaking these words: "Colonel Egerton had the French pox, and hath set it in the house" (meaning the plaintiff's house), "and William Smith and his wife" (meaning the plaintiff and his wife) "have it, and all you." The plaintiff hath a verdict. The defendant moves in arrest of judgment, and for cause shows, that the words are not actionable; for the words are, that Colonel Egerton hath set the French pox in the house, which is impossible; for the house could not have the pox, and the words, "William Smith and his wife have it," shall not be meant that they have the pox, but the house, for that is the next antecedent to the words, to which they shall refer. ROLL. J., held the words here actionable, and bid the plaintiff take his judgment, if cause were not shown to the contrary Saturday following. Judgment was afterwards given accordingly.¹

¹ Brook v. Wife, Cro. El. 214; Davies v. Taylor, Cro. El. 648; Garford v. Clerk, Cro. El. 857; Miller's Case, Cro. Jac. 480; Crittal v. Horner, Hob. 219; Elyott v. Blagen, Sty. 283; Marshall v. Chickall, 1 Sid. 50; Commings's Case, 2 Sid. 5; Lymb v. Hockley, 1 Lev. 205; Grimes v. Lovel, T. Ray. 446; Clifton v. Wells, T. Ray. 710; Whitfield v. Powel, 12 Mod. 248; Bloodworth v. Gray, 7 M. & G. 334; Watson v. McCarthy, 2 Ga. 57; Nichols v. Guy, 2 Ind. 82; McDonald v. Nugent, 122 Iowa, 651; Met-eye v. Times Co., 47 La. An. 824; Golderman v. Stearns, 7 Gray, 181; Williams v. Holdredge, 22 Barb. 396; Hewit v. Mason, 24 How. Pr. 366; Upton v. Upton, 51 Hun, 184; Simpson v. Press Co., 33 N. Y. Misc. Rep. 228; Kaucher v. Blinn, 29 Ohio St. 62; Irons v. Field, 9 R. I. 216 *Accord*.

Bury v. Chappel, Golds. 135; James v. Rutledge, 4 Rep. 17 a; Hunt v. Jones, Cro. Jac. 499; Califord v. Knight, Cro. Jac. 514 *Contra*. — Ed.

TAYLOR v. HALL.

IN THE KING'S BENCH, TRINITY TERM, 1743.

[Reported in 2 *Strange*, 1189.]

THE COURT held that it was not actionable to say the plaintiff had had the pox. For it is avoiding him for fear of contagion, and refusing to keep him company, that is the legal notion of damage; and when he is cured, those inconveniences will not attend him. And judgment was arrested.¹

"GEORGE, THE COUNT JOANNES," v. BURT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1863.

[Reported in 6 *Allen*, 336.]

HOAR, J.² The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. The *King v. Harvey*,³ *Southwick v. Stevens*.⁴ An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders.

In addition to this vital objection in matter of substance, the declaration fails to set forth the supposed cause of action in substantial conformity with the requirements of the statute; and contains many superfluous allegations, which are manifestly irrelevant, impertinent, and scandalous.

Appeal dismissed.

¹ *Smith's Case*, Noy, 157; *Dutton v. Eaton*, Al. 31; *Carlake v. Mapledoram*, 2 T. R. 473; *Nichols v. Guy*, 2 Ind. 82; *Pike v. Van Wormer*, 5 How. Pr. 171; *Irons v. Field*, 9 R. I. 216 *Accord*.

Austin v. White, Oro. El. 214; *Anon. Ow.* 34; *Hobson v. Hudson*, Sty. 199, 219 *Contra*. — Ed.

² Only the opinion of the court is given. — Ed.

³ 2 B. & C. 257.

⁴ 10 Johns. 443.

SECTION III. (*continued*.)

(d) DEFAMATORY WORDS NOT ACTIONABLE PER SE, BUT CAUSING SPECIAL DAMAGE.

DAVIES v. GARDINER.

IN THE COMMON PLEAS, TRINITY TERM, 1593.

[Reported in *Popham*, 36.¹]

AN ACTION upon the case for a slander was brought by Anne Davies against John Gardiner; That whereas there was a communication of a marriage to be had between the plaintiff and one Anthony Elcock, the defendant, to the intent to hinder the said marriage, said and published that there was a grocer in London that did get her with child, and that she had the child by the said grocer, whereby she lost her marriage. To which the defendant pleaded not guilty, and was found guilty at the assizes at Aylesbury, to the damage of 200 marks. And now it was alleged, in arrest of judgment, that this matter appeareth to be merely spiritual, and therefore not determinable at common law, but to be prosecuted in the spiritual court. But *per Curiam* the action lies here, for a woman not married cannot by intendment have so great advancement as by her marriage, whereby she is sure of maintenance for her life, or during her marriage, and dower and other benefits which the temporal law gives by reason of her marriage; and therefore by this slander she is greatly prejudiced in that which is to be her temporal advancement, for which it is reason to give her remedy by way of action at common law. As if a woman keep a victualling house, to which divers of great credit repair, whereby she hath her livelihood, and one will say to her guests, that as they respect their credits, they take care how they use such a house, for there the woman is known to be a bawd, whereby the guests avoid her house, to the loss of her husband, shall not she in this case have an action at common law for such a slander? It is clear that she will. So, if one saith that a woman is a common strumpet, and that it is a slander to them to come to her house, whereby she loseth the advantage which she was wont to have by her guests, she shall have her action for this at common law.

So here upon these collateral circumstances, whereby it may appear that she hath more prejudice than can be by calling of one harlot, and the like.

*And judgment was given for the plaintiff.*²

¹ 4 Rep. 16 b, s. c. — Ed.

² Dame Morrison's Case, Jenk. 316; Matthew v. Crasse, 2 Bulst. 89; Sell v. Facy, 2 Bulst. 276; s. c. 3 Bulst. 48; Nelson v. French, Cro. Jac. 422; Tomson's Case, Bendl. 148; Countess of Salop's Case, Bendl. 155; Taylor v. Tolwin, Latch, 218; Wicks v. Shepherd, Cro. Car. 155; Southold v. Daunston, Cro. Car. 269 *Accord*.

See Bridge v. Taylor, Litt. 193; Norman v. Simons, 1 Vin. Abr. Act. Words, D, a, 12. — Ed.

WILLIAM ALLSOP AND WIFE v. THOMAS ALLSOP.

IN THE EXCHEQUER, APRIL 25, 1860.

[Reported in 5 *Hurlstone & Norman*, 534.]

DECLARATION. — That, before the committing of the grievances, the said Hannah was the wife of the plaintiff, William Allsop; and the defendant, on divers occasions, falsely and maliciously spoke and published of the plaintiff Hannah the words following (to the effect that he had had carnal connection with her whilst she was the wife of the plaintiff, William Allsop): “Whereby the plaintiff Hannah lost the society of her friends and neighbors, and they refused to, and did not, associate with her as they otherwise would have done, and she was much injured in her credit and reputation, and brought into public scandal and disgrace; and, by reason of the committing of the grievances, the said Hannah became and was ill and unwell for a long time and unable to attend to her necessary affairs and business, and the plaintiff, William Allsop, was put to and incurred much expense in and about the endeavoring to cure her of the illness which she labored under as aforesaid by reason of the committing of the said grievances; and the said William Allsop lost the society and association of his said wife for a long time in his domestic affairs, which he otherwise would have had.”

Demurrer and joinder.

Quain, in support of the demurrer.¹

Prentice, contra.

POLLOCK, C. B. We are all of opinion that the defendant is entitled to judgment. There is no precedent for any such special damage as that laid in this declaration being made a ground of action, so as to render words actionable which otherwise would not be so. We ought to be careful not to introduce a new element of damage, recollecting to what a large class of actions it would apply, and what a dangerous use might be made of it. In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford v. Monroe*² is the only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or, in fact, any that do not fairly and naturally result from the wrongful act itself. It is only lately that a clear and distinct view of the subject of damages was taken, in *Hadley v. Baxendale*,³ in which it

¹ The arguments of counsel are omitted, together with the concurring opinions of MARTIN, BRAMWELL, and WILDE, BB. — Ed.

² 20 Wendell, 210.

³ 9 Exch. 341.

was held that a person whose duty it is to deliver goods to another is not responsible for any damages resulting from the non-delivery, unless they are the damages which would result immediately and naturally, that is, according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made contract. Slander may be repeated, and the repetition may cause mischief. In one sense nothing is more natural than that such should be the case. So there are many other consequences which may follow in libel and slander in respect of which there is no remedy. This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action.

*Judgment for the defendant.*¹

DAVIES AND WIFE v. SOLOMON.

IN THE QUEEN'S BENCH, NOVEMBER 29, 1871.

[*Reported in Law Reports, 7 Queen's Bench, 112.*]

BLACKBURN, J.² The sole difficulty in deciding the case is caused by the opinion of Lord Wensleydale in *Lynch v. Knight*.³ He held that no action would lie for slander of a wife when the only special damage alleged was the loss to the plaintiff of the consortium of her husband. In the present case, however, it is unnecessary to decide this question, for the declaration, after alleging the loss of cohabitation

¹ *Guy v. Gregory*, 9 C. & P. 584; *Adams v. Smith*, 58 Ill. 421; *Woodbury v. Thompson*, 3 N. H. 194; *Beach v. Ranney*, 2 Hill, 309; *Terwilliger v. Wands*, 17 N. Y. 54 (overruling *Bradt v. Towsley*, 13 Wend. 253; *Olmsted v. Brown*, 12 Barb. 657; *Fuller v. Fenner*, 16 Barb. 333); *Wilson v. Goit*, 17 N. Y. 54; *Bassell v. Elmore*, 48 N. Y. 561 *Accord*.

McQueen v. Fulgham, 27 Tex. 463; *Underhill v. Welton*, 32 Vt. 40 *Contra*.

DAMAGES TOO REMOTE. — Damage caused by another person's repetition of the defendant's words is too remote. *Holwood v. Hopkins*, Cro. El. 787; *Ward v. Weeks*, 7 Bing. 211 (but see *Riding v. Smith*, 1 Ex. D. 94); *Rutherford v. Evans*, 4 C. & P. 74; *Tunnichliff v. Moss*, 3 C. & K. 83; *Kendillon v. Maltby*, 1 Car. & M. 402; *Parkins v. Scott*, 1 H. & C. 153; *Dixon v. Smith*, 5 H. & N. 450; *Clark v. Morgan*, 38 L. T. Rep. 354; *Bree v. Marescaux*, 7 Q. B. Div. 434; *Cates v. Kellogg*, 9 Ind. 506; *Stevens v. Hartwell*, 11 Met. 542; *Hastings v. Stetson*, 126 Mass. 329; *Hastings v. Palmer*, 20 Wend. 225; *Hallock v. Miller*, 2 Barb. 630; *Olmsted v. Brown*, 12 Barb. 657; *Terwilliger v. Wands*, 17 N. Y. 58; *Fowles v. Bowen*, 30 N. Y. 20; *Bassell v. Elmore*, 48 N. Y. 561 (but see *Sewell v. Catlin*, 3 Wend. 295; *Kernholtz v. Becker*, 3 Den. 346).

But the rule is otherwise where the repetition is made as a privileged communication. *Gillett v. Bullivant*, 7 Law Times, 490; *Derry v. Handley*, 16 L. T. Rep. 263; *Fowles v. Bowen*, 30 N. Y. 22. — ED.

² Only the opinion of the court is given. — ED.

³ 9 H. L. C. 577.

by the wife, proceeds to aver that "she lost, and was deprived of the companionship, and ceased to receive the hospitality of divers friends." Now, first, was that consequence such as might reasonably and naturally be expected to follow from the speaking of the slanderous words? Judging from the habits and manners of society, of all the consequences that might be expected to result from a statement that a woman had committed adultery, or had been guilty of unchastity, the most natural would be that those who had invited her and given her hospitality would thenceforth cease to do so. Then *Moore v. Meagher*¹ decides that the loss of the hospitality of friends is sufficient special damage to sustain an action like the present, and the hospitality, as the word is there used, means simply that persons receive another into their houses, and give him meat and drink gratis. Perhaps such a definition may rather extend the signification of the word, but it is true in effect — for if they do not receive him, or if they make him pay for his entertainment, that is not hospitality. In *Roberts v. Roberts*,² it is to be observed, that the loss suffered by the plaintiff in being excluded from a religious society, was not temporal, and was therefore held not to be enough. But in the present case there is a matter of temporal damage — small though it be — laid in the declaration. It is also argued, that inasmuch as this action is brought by the wife, the husband being merely joined for conformity, the damage necessary to give a right to recover must be damage to her alone, and that the loss of hospitality which she has hitherto enjoyed, is only pecuniary loss to her husband, and not to her. That certainly is a plausible argument, as the husband is of course bound to maintain his wife and to supply her with food, although her friends cease to do so. I am, however, unwilling to agree with such artificial reasoning, and I think that the real damage in this case is to the wife herself. Notwithstanding that it is the husband's duty to support his wife, he is only bound to provide her with necessities suitable to his station in life; and she might, by visiting friends in a higher position than himself, enjoy luxuries which he either could not or might not choose to afford her. But I should be sorry to say that we must enter into a nice inquiry as to whether such hospitality would save the purse of the husband or of the wife. I am therefore of opinion that the declaration is good; and the demurrer must be overruled.

MELLOR and HANNEN, JJ., concurred.

Judgment for the plaintiff.

¹ 1 Taunt. 39.

² 5 B. & S. 384; 33 L. J. Q. B. 249.

W. CORCORAN AND WIFE v. CORCORAN.

IN THE EXCHEQUER, IRELAND, NOVEMBER 16, 17, 1857.

[Reported in 7 Irish Common Law Reports, 272.]

DEFAMATION. — The summons and plaint stated the speaking of words imputing prostitution to the plaintiff Anne, and calling her a vagabond, with an innuendo that this word imputed that she was a vagrant without a fixed place of abode. By means of the committing of which several grievances, the said plaintiff Anne hath been injured in her credit and reputation, and brought into disgrace with her acquaintances, in so much that her brother K. Dooley, who had promised to supply the said Anne with means to enable her to emigrate to Australia to join her husband, has now, in consequence of the imputations cast upon her character by the said defendant, retracted his promise until the truth or falsehood of the said charges shall have been first ascertained and established; whereby, &c.

Demurrer.

Sidney (with whom was *E. Hayes*), for the demurrer.

Mullins and *D. Lynch*, contra.

PENNEFATHER, B.¹ It certainly does strike me that this summons and plaint would not be good without the allegation of special damage.

Then, as to the special damage laid. I certainly agree that mere apprehension of damage would not be a sufficient statement; but here a promise has been laid. It is argued that no averment of the promisor's intention to perform it has been made, but I think it must be taken that he intended to perform it, until the contrary be shown. In cases of actions for breach of promise, as, for instance, of marriage, there is never any allegation contained to that effect, nor could it be maintained that, without such an averment, the pleading would not be sufficient.

Then follows an allegation here that, by reason of the speaking of the words, the promisor retracted his promise, and broke off his treaty of giving the plaintiff funds to enable her to emigrate. Now, if the words stopped there, I think there is no question whatever but there was special damage sustained by the breach of a promise which must have been beneficial to the plaintiff. The demurrer must be overruled.

¹ The case is materially abridged. — Ed.

MILLER v. DAVID.

IN THE COMMON PLEAS, JANUARY 20, 1874.

[*Reported in Law Reports, 9 Common Pleas, 1187.*]

THE first count stated that the defendant falsely and maliciously published of the plaintiff, a stone-mason, and employed as such in certain works carried on by one Mayberry, these words: "He was the ringleader of the nine-hours system," whereby and by means of which premises the plaintiff was injured in his occupation of a stone-mason, and was discharged from his said employment at the said works, to wit, the Old Castle Iron and Tin Plate Works, and was without and could not obtain employment for a considerable time, and could get no employment but one of less value to the plaintiff, the place of employment being distant from his place of abode, and his necessary meals thereby becoming more costly, and such place of employment being exposed to wet weather.

The second count was similar, except that the words spoken were: "He has ruined the town by bringing about the nine hours system, and he has stopped several good jobs from being carried out, by being the ringleader of the system at Llanelly."

Demurrer, on the ground that the words were not in themselves defamatory, and that special damage consequent thereon, therefore, gave no action. Joinder in demurrer.¹

Jan. 20. The judgment of the court (LORD COLERIDGE, C. J., and KEATING, BRETT, and DENMAN, JJ.) was delivered by

LORD COLERIDGE, C. J. In this case time was taken to consider our judgment, from the wish entertained by at least one member of the court to hold, if there were authority for the proposition, that a statement false and malicious made by one person in regard to another, whereby that other might probably, under some circumstances, and at the hands of some persons, suffer damage, would, if the damage resulted in fact, support an action for defamation. No proposition less wide in its terms than this would support the present declaration; for to call a man "the ringleader of the nine hours system," and to say of him that he "had ruined a place by bringing about that system," could not under many circumstances and at the hands of many people do the subject of such statement any damage at all. But we are unable to find any authority for a proposition so wide and general in its terms as would alone support this action.²

The rule, as laid down by De Grey, C. J., in *Onslow v. Horne*, that words are actionable if they be of probable ill consequence to a person in a trade or profession, or an office, is expressly disapproved of by the

¹ The statement of the counts is abridged, and the arguments of counsel are omitted.—Ed.

² But see now *Paterson v. Welch*, (Court of Sess. May 31, 1893) 20 R. 744. See also *Odgers, Lib. & Sl. (1st Ed.)* 87, 91; *Odgers, Outlines of Law of Libel*, 17, 18; *Clerk v. Lindsell, Torts, (1st Ed.)* 497-8; *Salmond, Torts*, 426-7; *Bower's Code of Actionable Defamation*, 338-9, 443-445.—Ed.

Court of Exchequer in *Lumby v. Allday*. Bayley, B., there says: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, or the like, or connects the imputation with the plaintiff's office, trade, or business." In that case, the words proved were a very strong imputation on the morality of the plaintiff, who was a clerk to a gas company. But the court held them not actionable, because the imputation conveyed by them did not imply the want of any of those qualities which a clerk ought to possess, and because the imputation had no reference to his conduct as clerk. That case and the language of Bayley, B., in delivering the judgment of the court, have since been repeatedly approved of, and are really decisive of this case.

The words before us are not actionable in themselves. No expression in them was argued to be so except the word "ringleader;" and, as to that, it is sufficient perhaps to say that Dr. Johnson points out the mistake of supposing that the word is by any means necessarily a word of bad import; for, amongst other authorities, he cites Barrow as calling St. Peter the "ringleader" of the Apostles.¹ Neither are the words connected with the trade or profession of the plaintiff, either by averment or by implication; so that, on neither ground can the declaration be supported. There is no averment here that the consequence which followed was intended by the defendant as the result of his words; and therefore it is not necessary to consider the question which was suggested on the argument, whether words not in themselves actionable or defamatory spoken under circumstances and to persons likely to create damage to the subject of the words, are, when the damage follows, ground of action. The judgment of Lord Wensleydale in *Lynch v. Knight*² appears in favor of the affirmative of this question. But it is not necessary for us, for the reasons given, to express any opinion upon it; and upon this demurrer there must be judgment for the defendant.

Judgment for the defendant.

¹ "It may be reasonable to allow St. Peter a primary of order, such a one as the ringleader hath in a dance." — Barrow's Treatise of the Pope's Supremacy, Oxford edition of Works, 1830, vol. vii. p. 70. In Fox's Preface to Tyndall's Works, "these three learned fathers of blessed memory, William Tyndall, John Frith, and Robert Barons," are styled "chief ringleaders in these latter tymes of thys Church of England."

² 9 H. L. C., at p. 600.

SHEPPARD v. WAKEMAN.

IN THE KING'S BENCH, HILARY TERM, 1662.

[Reported in 1 *Levins*, 58.]

CASE where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsely and maliciously, to hinder the marriage, wrote a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved that the action did not lie, the

SECTION IV.

Justification.

(a) TRUTH OF PUBLICATION.

ALVAN W. FOSS v. HORACE T. HILDRETH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1865.

[Reported in 10 Allen, 76.]

CHAPMAN, J. The defendant's counsel requested the court to give certain instructions to the jury, as stated in the bill of exceptions. One of the instructions prayed for was, that the truth is not a defence to an action of slander, if the words were spoken maliciously or without any reason on the part of the defendant to believe they were true.¹ But in respect to verbal slander the law has always been otherwise. A special plea in justification sets forth the truth of the words merely. 3 Chit. Pl. 1031.

*Exceptions overruled.*²

¹ Only the opinion of the court upon this point is given. — Ed.

² Lucas v. Cotton, Moore, 79; Underwood v. Parks, 2 Stra. 1200; Ellis v. Buzzell, 60 Me. 209; Baum v. Clause, 5 Hill, 196 Accord.

The rule is the same as to actions for a libel. Leyman v. Latimer, 3 Ex. D. 15, 352; Castle v. Houston, 19 Kas. 417. Unless modified by statute, as in Delaware, Florida, Illinois, Maine, Massachusetts; Nebraska, New York, Rhode Island and West Virginia. Delaware Co. v. Crossdale, 6 Houst. 181; Jones v. Townsend, 21 Fla. 431; Palmer v. Adams, 137 Ind. 72; Perry v. Porter, 124 Mass. 338; Fordyce v. Richmond, 78 Neb. 752; McClangworthy v. Cooper, 39 W. Va. 313. In New Hampshire and Pennsylvania, however, the mere truth of the libel is not always a defence, although there is no such statute. Hutchins v. Page, (N. H. 1909) 72 Atl. R. 689; Burkhart v. N. Am. Co., 214 Pa. 39.

defendant claiming title to her himself, like as Gerrard's Case, 4 Co., for slander of title. But after divers motions, the plaintiff had judgment, for it is found to be malicious and false; and if such an action should not lie, a mean and a base person might injure any person of honor and fortune by such a pretence.

SECTION IV. (*continued.*)

(b) REPETITION OF ANOTHER'S STATEMENT.

McPHERSON v. DANIELS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1829.

[Reported in 10 Barnewall & Cresswell, 263.]

SLANDER for an imputation of insolvency. The defendant pleaded that at the time of uttering the said words he declared that he had heard and been told the same from and by one T. W. Woor. General demurrer.¹

LITLEDALE, J. For the reasons already given by my Brother Bayley, I think that the plea is bad; but with reference to the resolution in Lord Northampton's case, I will say a few words. That resolution has been frequently referred to within the last thirty years, and though not expressly overruled has been generally disapproved of. The latter part of that resolution is extra-judicial, for it was not necessary to come to any resolution respecting private slander in the Star Chamber. It is somewhat inconsistent with the third resolution, where it is laid down, "that if one hear false and horrible rumors, either of the king or of any of the grantees, it is not lawful for him to relate to others that he heard J. S. say such false and horrible words, for if it should be lawful, by this means *they may be published generally.*" It was resolved then, that in the case of *scandalum magnatum* it was not lawful to repeat slander, because, if it was, it might circulate generally. Now the same inconvenience, viz. the general publication of slander, though differing in degree, would follow from the repetition of slander in either case. The fourth resolution, however, in terms, perhaps does not go the length of saying that a defendant may justify the repetition of slander generally, but only that he may justify under certain circumstances. Assuming that it imports that a defendant may justify the repetition of slander generally, by showing that he named his original author, I think that it is not law.

The declaration, which contains a technical statement of the facts necessary to support the action, alleges that the defendant falsely and maliciously published the slander to the plaintiff's damage. In order to maintain such an action, there must be malice in the defendant and a damage to the plaintiff, and the words must be untrue. Where words, falsely and maliciously spoken, as in this case, are actionable in themselves, the law *prima facie* presumes a consequent damage without proof. In other cases actual damage must be proved. To constitute a good defence, therefore, to such an action, where the publication of the slander is not intended to be denied, the defendant must negative

¹ The statement of the pleadings is abridged, and only the opinion of LITLEDALE, J., is given. BAYLEY and PARKE, JJ., concurred. — Ed.

the charge of malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse), or show that the plaintiff is not entitled to recover damages. It is competent to a defendant, upon the general issue, to show that the words were not spoken maliciously; by proving that they were spoken on an occasion, or under circumstances which the law, on grounds of public policy, allows, as in the course of a parliamentary or judicial proceeding, or in giving the character of a servant. But if the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice, (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shows that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess. (Now, a defendant, by showing that he stated at the time when he published slanderous matter of a plaintiff, that he heard it from a third person does not negative the charge of malice, for a man may wrongfully and maliciously repeat that which another person may have uttered upon a justifiable occasion. Such a plea does not show that the slander was published on an occasion, or under circumstances which the law, on grounds of public policy, allows. Nor does it show that the plaintiff has not sustained, or is not entitled in a court of law to recover, damages. As great an injury may accrue from the wrongful repetition, as from the first publication of slander, the first utterer may have been a person insane, or of bad character. The person who repeats it gives greater weight to the slander. A party is not the less entitled to recover damages in a court of law for injurious matter published concerning him, because another person previously published it. That shows not that the plaintiff has been guilty of any misconduct which renders it unfit that he should recover damages in a court of law, but that he has been wronged by another person as well as the defendant; and may, consequently, if the slander was not published by the first utterer on a lawful occasion, have an action for damages against that person as well as the defendant. It seems to me, therefore, that such a plea is not an answer to an action for slander, because it does not negative the charge of malice, nor does it show that the plaintiff is not entitled to recover damages.

Judgment for plaintiff.¹

¹ That the defendant repeated a defamation, giving the name of the author, seems originally to have been a justification. *Northampton's Case*, 12 Rep. 134 (Fourth Resolution). But the name of the author was to be given at the time of repetition, and not for the first time in the plea. *Davis v. Lewis*, 7 T. R. 17. The words, furthermore, had to be given with sufficient exactness to ground an action against the author. *Maitland v. Goldney*, 2 East, 426. Doubts were thrown upon the validity of this justification in *Lewis v. Walter*, 4 B. & Al. 605. The whole doctrine was repudiated, as to libel, in *De Crespigny v. Wellesley*, 5 Bing. 392, and *Tidman v. Ainslie*, 10 Ex. 63; and as to slander, in *McPherson v. Daniels*; *Watkin v. Hall*, L. R. 3 Q. B. 396.

See to same effect *Brewer v. Chase*, 121 Mich. 526; *Vallery v. State*, 42 Neb. 123. — Ed.

SECTION IV. (*continued.*)

(c) LEAVE AND LICENSE.

HOWLAND v. BLAKE MANUFACTURING CO.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 22, 1892.

[*Reported in 156 Massachusetts Reports, 543.*]

KNOWLTON, J. 6.¹ The jury were instructed that, "if the defendant gave a copy of the libel to Berry, there having been no previous publication by the defendant, and Berry in procuring such copy acted as the agent of the plaintiffs, and at their request, and such publication was procured with the view to bringing action, the publication was privileged." This was in accordance with views expressed by English judges, and was sound in principle. *Rogers v. Clifton*,² *Duke of Brunswick v. Harmer*,³ *King v. Waring*,⁴ *Smith v. Wood*,⁵ *Odgers, Libel and Slander*, 229. If the defendant is guilty of no wrong against the plaintiff except a wrong invited and procured by the plaintiff for the purpose of making it the foundation of an action, it would be most unjust that the procurer of a wrongful act should be permitted to profit by it.⁶

¹ Only the opinion of the court upon this point is given. — Ed.

² 3 Bos. & P. 587, 592.

³ 14 Q. B. 185.

⁴ 5 Esp. 13.

⁵ 3 Camp. 323.

⁶ *King v. Waring*, 5 Esp. 13; *Rogers v. Clifton*, 3 B. & P. 587, 592; *Weatherston v. Hawkins*, 1 T. R. 110, 112; *Smith v. Wood*, 3 Camp. 323; *Duke v. Harmer*, 14 Q. B. 185; *Palmer v. Hummerston*, 1 Cab. & E. 36; *Gordon v. Spence*, 2 Blackf. 286; *Sutton v. Smith*, 13 Mo. 120; *Miller v. Donovan*, 16 N. Y. Misc. Rep. 453 *Accord.* — Ed.

SECTION V.

Absolute Privilege.

SCOTT v. STANSFIELD.

IN THE EXCHEQUER, JUNE 3, 1868.

[Reported in *Law Reports*, 3 *Exchequer*, 220.]

DECLARATION that the defendant published of the plaintiff in relation to his business as a scrivener these words: "You are a harpy, preying on the vitals of the poor."

Plea: That the defendant uttered the said words while acting as a judge in the trial of a cause wherein the now plaintiff was defendant.

Replication: That the words were spoken falsely and without reasonable cause, and were wholly irrelevant and impertinent to the cause before the defendant as the latter then well knew.

Demurrer.¹

KELLY, C. B. I am of opinion that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the Superior Courts, but to the court of a coroner and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter on which he had

¹ The statement of the pleadings is abridged; the arguments of counsel and the concurring opinions of MARTIN, CHANNELL, and BRAMWELL, BB., are omitted. — ED.

commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge it would have, if the analogy of similar cases is to be followed, to be submitted to the jury. Thus, if we were to hold that an action is maintainable against a judge for words spoken by him in his judicial capacity, under such circumstances as those appearing on these pleadings, we should expose him to constant danger of having questions such as that of good faith or relevancy raised against him before a jury, and of having the mode in which he might administer justice in his court submitted to their determination. It is impossible to overestimate the inconvenience of such a result. For these reasons I am most strongly of opinion that no such action as this can, under any circumstances, be maintainable.

*Judgment for the defendant.*¹

SEAMAN v. NETHERCLIFT.

IN THE COURT OF APPEAL, DECEMBER 15, 1876.

[Reported in 2 Common Pleas Division, 53.]

APPEAL from the decision of the Common Pleas Division, ordering judgment to be entered for the defendant.²

Claim: That defendant said of a will, to the signature of which the plaintiff was a witness, "I believe the signature to the will to be a rank forgery, and I shall believe so to the day of my death," meaning that the plaintiff had been guilty of forging the signature of the testator, or of aiding and abetting in the forgery.

Defence: That defendant spoke the words in the course of giving his evidence as a witness on a charge of forgery before a magistrate.

Reply: That the words were not *bona fide* spoken by defendant as a witness, or in answer to any question put to him as a witness, and he was a mere volunteer in speaking them for his own purposes otherwise than as a witness and maliciously and out of the course of his examination.³

COCKBURN, C. J. The case is, to my mind, so abundantly clear, and I believe to the minds of my learned brothers, that I think we ought not to hesitate to at once pronounce our decision.

¹ *Rex v. Skinner*, Loft, 55; *Thomas v. Churton*, 2 B. & S. 475; *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *Dawkins v. Prince Edward*, 1 Q. B. D. 499; *Law v. Llewellyn*, [1906] 1 K. B. 487 (judge of inferior court — Scotch case *Allardice v. Robertson*, 1 Dow. & Cl. 496 not followed); *Bottomley v. Brougham*, [1908] 1 K. B. 584; (official receiver); *Miller v. Hope*, 2 Shaw, Ap. Cas. 125; *Yates v. Lansing*, 5 Johns. 282, 9 Johns. 395 (but see *Aylesworth v. St. John*, 25 Hun, 156) *Accord*.

Kendillon v. Maltby, Car. & M. 402, 2 M. & Rob. 438, s. c., lays down too restricted a rule. — Ed.

² 1 C. P. D. 540.

³ The arguments of counsel and the opinion of AMPHLETT, J. A., are omitted. — Ed.

The plaintiff brings his action against the defendant for slander, alleged to have been uttered on the occasion of a prosecution for forgery before a magistrate of the city of London. The defence set up is: "True, I did utter the words imputed to me, but I spoke them when I was a witness in a case in which I was called as a witness." The plaintiff's answer to that is, "Yes, you were called as a witness, but you spoke these words when you were no longer giving evidence, and not only knowing them to be false, but also not in the inquiry, and dehors altogether the subject-matter of the inquiry, for your own purpose of maliciously defaming me." At the trial before Lord Coleridge it appeared that in the Probate suit of *Davies v. May* the defendant had been examined, as an adept, to express his opinion as to the genuineness of a signature to a will, and he gave it as his opinion that the signature was a forgery. The president of the court, in addressing the jury, made some very strong observations on the rashness of the defendant in expressing so confident an opinion in the face of the direct evidence. Soon afterwards, on a prosecution for forgery before the magistrate, the defendant was called as an adept by the person charged, when he expressed an opinion favorable to the genuineness of the document. He was then asked by the counsel for the prosecution whether he had been a witness in the suit of *Davies v. May*. He answered, "Yes." And he was then asked, "Did you read a report of the observations which the presiding judge made on your evidence?" He again said, "Yes." And then the counsel stopped. I presume the circumstances of the trial were well known, and the counsel thought he had done enough. The defendant, the witness, expressed a desire to make a statement. The magistrate told him he could not hear it. Nevertheless the defendant persisted and made the statement, the subject-matter of this action of slander.

On the proof of these facts Lord Coleridge reserved leave to the defendant to move to enter judgment, if the court should be of opinion that there was no evidence on behalf of the plaintiff which ought to be left to the jury. It occurred to him, however, that it would be as well to take the opinion of the jury, and they found that the replication was true, viz. that the words were spoken, not as a witness in the course of the inquiry, but maliciously for his own purpose, that is, with intent to injure the plaintiff. Upon these findings judgment was entered for the plaintiff, leave being again reserved to enter judgment for the defendant, and the Court of Common Pleas gave judgment for the defendant.

Now, if the findings of the jury had been founded upon evidence by which they could have been supported, I might have had some hesitation about the decision. But they were not; and we are asked to come to a conclusion contrary to what has been established law for nearly three centuries.

If there is anything as to which the authority is overwhelming it is that a witness is privileged to the extent of what he says in course of his examination. Neither is that privilege affected by the relevancy

or irrelevancy of what he says ; for then he would be obliged to judge of what is relevant or irrelevant, and questions might be, and are, constantly asked which are not strictly relevant to the issue. But that, beyond all question, this unqualified privilege extends to a witness is established by a long series of cases, the last of which is *Dawkins v. Lord Rokeby*,¹ after which to contend to the contrary is hopeless. It was there expressly decided that the evidence of a witness with reference to the inquiry is privileged, notwithstanding it may be malicious ; and to ask us to decide to the contrary is to ask what is beyond our power. But I agree that if in this case, beyond being spoken maliciously, the words had not been spoken in the character of a witness or not while he was giving evidence in the case, the result might have been different. For I am very far from desiring to be considered as laying down as law that what a witness states altogether out of the character and sphere of a witness, or what he may say dehors the matter in hand, is necessarily protected. I quite agree that what he says before he enters or after he has left the witness-box is not privileged, which was the question in the case before Lord Ellenborough.² Or if a man when in the witness-box were to take advantage of his position to utter something having no reference to the cause or matter of inquiry in order to assail the character of another, as if he were asked, " Were you at York on a certain day ? " and he were to answer, " Yes, and A. B. picked my pocket there ; " it certainly might well be said in such a case that the statement was altogether dehors the character of witness, and not within the privilege.

If, therefore, the findings of the jury, that the defendant had ceased to be a witness when he spoke the words, were justified by the evidence, I should hesitate before I decided in his favor. But I think the defendant was entitled to judgment on the first reservation. There was no evidence to go to the jury upon the plaintiff's case. What the defendant said was said in his character of witness ; for there can be no doubt that the words were spoken in consequence of the question put to him by counsel for the prosecution, the object and effect of the cross-examination having been to damage his credibility as a witness before the magistrate, and of this the witness was conscious. The counsel, having put the question, stops ; and if there had been counsel present for the prisoner who had re-examined the witness, he would have put the proper questions to rehabilitate him to the degree of credit to which he was entitled. That such questions would have been relevant I cannot bring myself for a moment to doubt, relating as they do to the credibility of the witness, which is part of the matter of which the magistrate has to take cognizance. That being so, the witness himself, who is sworn to speak the whole truth, is properly entitled, not only with a view to his own vindication, but in the interest of justice, to make such an observation in explanation

¹ Law Rep. 7 H. L. 744.

² *Trotman v. Dunn*, 4 Camp. 211.

of his former answer as is just and fair under the circumstances. That is what the defendant did. The sitting magistrate having allowed the disparaging question to be put and answered, ought not to have interfered to prevent the defendant from giving an explanation. I think the statement, coming immediately after the damaging question had been put to him, must be taken to be part of his testimony touching the matter in question, as it affects his credibility as a witness in the matter as to which he was called. It was given as part of his evidence before he had become divested of his character of witness; and but for the question of the opposite counsel he never would have made the statement at all.

As to the finding of malice, it is true that what the defendant said might possibly have the effect of damaging the plaintiff's character; but can any one suppose that the defendant had this in his mind when he spoke, or that he intended to injure the plaintiff? He thought only of his own credit as a witness, which had been attacked. He spoke, on the impulse of the moment, no doubt very foolishly; and it was probably his foolish persistence in maintaining the same attitude and setting up his own opinion against the positive testimony of the other witnesses that prejudiced the jury against him, and led them to return the findings they did, founded, in reality, upon no evidence at all. In my opinion, the Lord Chief Justice should have nonsuited the plaintiff, which is the conclusion at which the Court of Common Pleas ultimately arrived; for there really was no evidence that the defendant was speaking otherwise than as a witness and relevantly to the matters in issue, because relevantly to his own character and credibility as a witness in the matter. That being so, even if express malice could have been properly inferred from the circumstances, the case of *Dawkins v. Lord Rokeby*¹ conclusively decides that malice has ceased to be an element in the consideration of such cases, unless it can be shown that the statement was made not in the course of giving evidence, and therefore not in the character of a witness. A long series of authorities, from the time of Elizabeth to the present time, has established that the privilege of a witness while giving evidence is absolute and unqualified. *Allardice v. Robertson*² was relied upon by Mr. Chambers. That was the case of an action against a magistrate for words spoken on the bench, and Lord Wynford expressly distinguishes the two cases, and says that the privilege of a judge of the superior courts does not apply to the judge of an inferior court; and that in the case of the latter the privilege is not absolute and unqualified, and that a "subordinate judge" would be liable to an action if malice were proved. It does not, therefore, touch the present case; and as to a witness speaking with reference to the subject-matter of the issue, it is clear that the privilege is unqualified.

The judgment of the Common Pleas Division must, therefore, be affirmed.

¹ Law Rep. 7 H. L. 744.

² 1 Dow. N. S. 495, 515.

BRAMWELL, J. A. I am of the same opinion. The judgment of the Common Pleas affirmed two propositions. First, that what the defendant said was said as a witness, and was relevant to the inquiry before the magistrate; secondly, that, that being so, the Lord Chief Justice should have stopped the trial of the action by nonsuiting the plaintiff.

As to the first proposition, I am by no means sure that the word "relevant" is the best word that could be used; the phrases used by the Lord Chief Baron and the Lord Chancellor in *Dawkins v. Lord Rokeby*¹ would seem preferable, "having reference," or "made with reference to the inquiry." Now, were the judges of the Common Pleas Division right in holding that this statement of the defendant had reference to the inquiry? I think that they were. There can be no doubt that the question put by the cross-examining counsel ought not to have been allowed: "Have you read what Sir James Hannen is reported to have said as to your evidence in *Davies v. May*?" What Sir James Hannen had said in a former case was not evidence. It was, therefore, an improper question, and the answer to it, if untrue, would not have subjected the witness to an indictment for perjury. But the question having been put, and the answer having been in the affirmative—and the question being, as Lord Coleridge observed, "ingeniously suggestive," viz. that the way the defendant had been dealt with on the former occasion did not redound to his credit as a witness—the defendant insisted on making in addition the statement complained of. He did so, in my opinion, very foolishly. It would have been better to have been satisfied with retaining his own opinion without setting it up in direct opposition to the positive testimony of eye-witnesses. But he foolishly, as I think, and coarsely exclaimed, "I believe that will to be a rank forgery, and shall believe so to the day of my death." Suppose after he had said "yes," he had added in a decent and becoming manner, "and I am sorry Sir James Hannen said what he did, for I took great pains to form my own opinion, and I shall always retain it, as I still think it right." Would not that have had reference to the inquiry before the magistrate? And would it not have been reasonable and right that the witness should have added that statement in justification of himself? Surely, yes. Mr. Clarke said he was prepared to maintain that as long as a witness spoke as a witness in the witness-box, he was protected, whether the matter had reference to the inquiry or not. I am reluctant to affirm so extreme a proposition. Suppose while the witness is in the box, a man were to come in at the door, and the witness were to exclaim, "That man picked my pocket." I can hardly think that would be privileged. I can scarcely think a witness would be protected for anything he might say in the witness-box, wantonly and without reference to the inquiry. I do not say he would not be protected. It might be held that it was better that everything a witness said as a witness should

¹ Law Rep. 7 H. L., at p. 744.

² Law Rep. 7 H. L. 744.

be protected, than that witnesses should be under the impression that what they said in the witness-box might subject them to an action. I certainly should pause before I affirmed so extreme a proposition, but without affirming that, I think the words "having reference to the inquiry" ought to have a very wide and comprehensive application, and ought not to be limited to statements for which, if not true, a witness might be indicted for perjury, or the exclusion of which by the judge would give ground for a new trial; but ought to extend to that which a witness might naturally and reasonably say when giving evidence with reference to the inquiry as to which he had been called as a witness. Taking that view, I think the first proposition is established, that the statement of the defendant was made as witness and had reference to the inquiry.

As to the second proposition, that, if the first be made out, no inquiry can be gone into as to whether the statement was false or malicious or as a volunteer, we are bound by authority. The case of *Dawkins v. Lord Rokeby*¹ is directly in point, and binding upon us even if we disliked the decision. Mr. Chambers has not attempted to distinguish that case except on the ground that the inquiry in that case was before a military court. But it is clearly not distinguishable on that ground. The learned Lords determined that what is true of a civil tribunal is true of a military court of inquiry; and they affirmed most distinctly the proposition that if the evidence has reference to the inquiry, the witness is absolutely privileged. There is also the case in the Court of Error of *Henderson v. Broomhead*,² which is precisely to the same effect, and undistinguishable from the present case.

I am, therefore, of opinion that the judgment of the Common Pleas Division was right, and must be affirmed. *Judgment affirmed.*³

¹ Law Rep. 7 H. L. 744.

² 4 H. & N. 569.

³ *Revis v. Smith*, 18 C. B. 126; *Henderson v. Broomhead*, 4 H. & N. 569; *Dawkins v. Rokeby*, L. R. 7 H. L. 744, L. R. 8 Q. B. 255 (Military court of inquiry); *Goffin v. Donnelly*, 6 Q. B. D. 307 (Select committee of House of Commons); *Gompass v. White*, 6 T. L. R. 20; *Watson v. Jones*, [1905] A. C. 480 (privilege extends to statement to client and solicitor in preparation of case for trial); *Terry v. Fellows*, 21 La. An. 375; *Hunkle v. Voneiff*, 69 Md. 173; *Runge v. Franklin*, 72 Tex. 585; *Kennedy v. Hilliard*, 10 Ir. C. L. R. 195 *Accord*.

See also *Hutchinson v. Lewis*, 75 Ind. 55; *Liles v. Gaster*, 42 Oh. St. 631.

In *Dawkins v. Lord Rokeby*, *supra*, Lord Penzance said: "It is said that a statement of fact of a libellous nature which is palpably untrue — known to be untrue by him who made it, and dictated by malice — ought to be the subject of a civil remedy, though made in the course of a purely military inquiry. This mode of stating the question assumes the untruth and assumes the malice. If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.

"But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open

MUNSTER v. LAMB.

IN THE COURT OF APPEAL, JULY 5, 1883.

[Reported in 11 *Queen's Bench Division*, 588.]

BRETT, M. R.¹ This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been.

It has been contended that as a person defamed has, *prima facie*, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts: it consists of a number of principles, which are recognized as having existed during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume a power of that kind: they only endeavor to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts. Therefore, with regard to the present case, we have to find out whether there is a principle of the common law, which although it has existed

to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands.

"These considerations have long since led to the legal doctrine that a witness in the courts of law is free from any action; and I fail to perceive any reason why the same considerations should not be applied to an inquiry such as the present, and with the same result." — ED.

¹ Only the opinion of BRETT, M. R., is given. — ED.

from the beginning, is now to be applied for the first time. I cannot find that there has been a decision of a court of law with reference to such facts as are now before us, that is, with regard to a person acting in the capacity of counsel: but there have been decisions upon analogous facts; and if we can find out what principle was applied in these decisions upon the analogous facts, we must consider how far it governs the case before us.

Actions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. It is not that these statements are libel or slander subject to a defence, but the principle is that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander of which the law takes notice. Many privileged occasions have been recognized. The occasion, with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates: it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of an inquiry as to the administration of the law. It was admitted that so long as an advocate acts *bona fide* and says what is relevant, owing to the privileged occasion, defamatory statements made by him do not amount to libel or slander, although they would have been actionable if they had not been made whilst he was discharging his duty as an advocate. But it was contended that an advocate cannot claim the benefit of the privilege unless he acts *bona fide*, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. Certain persons can claim the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration I may say that those persons are judges, advocates, parties, and witnesses. There have been decisions with regard to three of these classes, namely, judges, parties, and witnesses, and it has been held that whatever they may have said in the course of an inquiry as to the administration of the law, has been said upon a privileged occasion, and that they are not liable to any action for libel or slander. But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are, judges, parties, and witnesses, who make statements without malice and relevantly; and that those judges, parties, and witnesses, who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. I am inclined to think that with regard to these classes of persons the law has not always been

stated in the same manner by the judges, and some judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted. With regard to witnesses, the chief cases are, *Revis v. Smith*,¹ and *Henderson v. Broomhead*,² and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the court — whether what they say is relevant or irrelevant, whether what they say is malicious or not — are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, on *viva voce* examination, or whether it has been made upon affidavit. It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained of was false to the knowledge of the witness, and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable. If an action for libel or slander cannot be maintained, how can such an action as I have mentioned be maintained, it being in truth an action for defamation in an altered form? Every objection and every reason, which can be urged against an action for libel or slander, will equally apply against the suggested form of action. Therefore, to my mind, the best way to deal with the suggested form of action is to dispose of it in the words of Crompton, J., in *Henderson v. Broomhead*, where he said: "The attempts to obtain redress for defamation having failed, an effort was made in *Revis v. Smith*¹ to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair." Nothing could be more strong, nothing could show more clearly his entire disbelief in the possibility of supporting that new form of action. The answer to the suggested form of action was that during the hundreds of years which had elapsed such an action never had been sustained. No reported case from the time of the commencement of the common law until the present day can be found in which the suggested form of action has been maintained, and yet it is impossible to suppose that opportunities for bringing actions of that kind and of carrying them to a conclusion have not occurred again and again. However, the question is not as to the form of the action, but whether an action of any kind will lie for defamation uttered in the course of a judicial proceeding. Crompton, J., in *Henderson v. Broomhead*, also said: "No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be

¹ 18 C. B. 126; 25 L. J. C. P. 195.

² 4 H. & N. 569.

said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. Cresswell, J., pointed out in *Revis v. Smith*¹ that the inconvenience is much less than it would be if the rule were otherwise. The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court." It is there laid down that the reason for the rule with regard to witnesses is public policy. In *Scott v. Stansfield* it was held that all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously and without reasonable or probable cause. The ground of the decision was that the privilege existed for the public benefit: of course it is not for the public benefit that persons should be slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty. Therefore the cases of both witnesses and judges fall within the rule as to privileged occasions, notwithstanding it may be proved that any defamatory words spoken by them were uttered from an indirect motive and to gratify their own malice. In *Dawkins v. Lord Rokeby*² it was assumed for the purposes of the decision, that the defendant had been guilty of both falsehood and malice; nevertheless it was held that no action would lie against him for statements made by him as a witness. The ground of the decision was no doubt that a witness in giving his evidence should not be afraid of being sued for anything that he might say. A similar view of the law was taken in *Seaman v. Netherclift*; and the same rule has been applied to the parties. If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes — judge, witness, and counsel — it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says

¹ 18 C. B. 126.² Law Rep. 8 Q. B. 255.

is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting *bona fide*, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. In *Rex v. Skinner*,¹ Lord Mansfield, a judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a judge or a witness. In *Dawkins v. Lord Rokeby*² a most careful judgment was delivered on behalf of all the judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with judges and witnesses. I will refer to *Kennedy v. Hilliard*,³ and in that case Pigott, C. B., delivered a most learned judgment, in the course of which he said: ⁴ "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, *bona fides*, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.

I am of opinion that the rule of law is such as I have pointed out,

¹ Loft, 55.

² Law Rep. 8 Q. B. 255, at pp. 263, 264, 268.

³ 10 Ir. C. L. Rep. N. S. 195.

⁴ 10 Ir. C. L. Rep., at p. 209.

that it ought to be applied in the present case, and therefore that this action cannot be maintained.

From our judgments it is obvious that we dissent from the opinion of Lord Denman, C. J., expressed by him at *Nisi Prius* in *Kendillon v. Maltby*.¹

*Appeal dismissed.*²

GILBERT v. THE PEOPLE.

IN THE SUPREME COURT, NEW YORK, MAY, 1841.

[Reported in 1 Denio, 41.]

By the Court, BEARDSLEY, J.³ Whatever may be said or written by a party to a judicial proceeding, or by his attorney, solicitor or counsel therein, if pertinent and material to the matter in controversy, is privileged, and consequently lays no foundation for a private action or a public prosecution. The general language of elementary writers is, that whatever occurs in the regular course of justice is privileged, (Hawk. P. C., B. 1, ch. 73, § 8; 3 Chit. Cr. Law, 869; 1 Saund. 131 (1.); 1 Russ. on Crimes, 307; Bac. Abr. Libel, A. 4;) and by which they intend to indicate the principle I have stated. If what is said or written is pertinent and material to the controversy, the protection to parties and those who represent them, (for all stand on the same ground,) is absolute and unqualified, and no one shall be permitted to allege that it was done with malice. But this is the extent of the privilege; for if a party or his agent will pass beyond the prescribed limit to asperse and vilify another, by word or writing, he is without protection, and, as in other cases, must abide the consequences of his own misconduct. If slanderous words are used, he is a slanderer; and if he offends in writing, he is a libeller, and may be prosecuted both civilly and criminally as such. *Hastings v. Lusk*,⁴ *Hodgson v. Scarlet*,⁵ *Ring v. Wheeler*.⁶ See also *Thorn v. Blanchard*.⁷

This being the principle which must govern all cases of this character, it is only necessary to see how it applies to the one now before us. The alleged libellous matter was part of a declaration in a justice's court, which was prepared and presented to the justice by the plaintiff in error, who acted on that occasion as counsel for the plaintiffs in the cause. The action was trespass, for entering the close of

¹ Car. & M. 402; 2 M. & R. 438.

² *Pedley v. Morris*, 61 L. J. Q. B. 21 *Accord*.

See *Buckley v. Wood*, 4 Rep. 14 b; *Hodgson v. Scarlet*, 1 B. & Ald. 232; *Mackay v. Ford*, 5 H. & N. 792. — ED.

³ Only the opinion of the court is given. — ED.

⁴ 22 Wend. 410.

⁵ 1 Barn. & Ald. 232.

⁶ 7 Conn. R. 725.

⁷ 5 John. R. 508.

the plaintiffs and taking and killing divers sheep, and for other alleged injuries to sheep, wool, sheepskins and mutton. Supposing the declaration in stating these grievances to be free from objection, it still had other statements and insinuations which could not but have been intended to stir up the passions of the defendant in that suit, and to make him an object of dark suspicion as well as of ridicule and contempt. The declaration alleged that the defendant was "reported to be fond of sheep, bucks and ewes, and of wool, mutton and lambs," and "in the habit of biting sheep;" and it was added that if guilty he "ought to be hanged or shot." These and other suggestions of the like character, to be found in this declaration, were in no respect relevant or material to the action, and obviously must have been thrown in to scandalize and annoy the defendant. What had the court to do with these alleged "reports" and "habits"? Certainly nothing. They could have no possible bearing on the issue to be tried, or the damages which might be assessed for the alleged trespass, although they might very well serve to irritate and disgrace the party who was charged to be the subject of such reports and habits. It would be lamentable if irrelevant, gratuitous and malicious attacks could be excused, because inserted in a declaration upon other and distinct causes of action, and with which the vituperative charges had no connection whatever. The demurrer admits that these charges and insinuations were false and malicious, and as they were in no sense pertinent to the action, they were libellous.

*The judgment should be affirmed.*¹

J. N. WHITE, RESPONDENT, v. D. L. CARROLL, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, 1870.

[Reported in 42 New York Reports, 161.]

SUTHERLAND, J.² On the trial of this action, before Mr. Justice Potter and a jury at the circuit, it appeared, that in 1858 and 1859, a proceeding was going on before the surrogate of Montgomery county, in which the contested point or question was the testamentary capacity of one Jay Phillips; that the plaintiff and the defendant were both at the time, and for some years previously had been, practising as physicians at Amsterdam, Montgomery county, the plaintiff as a homœopathic physician, and the defendant as an allopathic physician; that both had been sworn as witnesses, and testified in the proceedings before the surrogate, the defendant some time after the plaintiff; that

¹ Union Co. v. Thomas, 83 Fed. 803; King v. McKissick, 126 Fed. 215; Myers v. Hodges, 53 Fla. 197; Gaines v. Etna Co., 104 La. 695; Jones v. Brownlee, 161 Mo. 258; Kemper v. Fort, 219 Pa. 85; Crockett v. McLanahan, 109 Tenn. 517 Accord.

In England statements in a pleading are absolutely privileged, though not relevant. Hodson v. Pare, [1899] 1 Q. B. 455.

In Louisiana the statement of parties in judicial proceedings are not absolutely privileged. Lescal v. Joseph Schwartz Co., 116 La. 293, 118 La. 718; Dunn v. So. Co., 116 La. 431. — Ed.

² Only part of the opinion of the court is given. — Ed.

on the examination of the defendant as such witness, he was asked whether any other physician was in attendance on Jay Phillips, at the time he was attending him, and that he answered: "Not as I know of." That he was then asked: "Did not any physician attend him, at the time he was at Mrs. Moore's, when you did not?" That to this question, the defendant answered: "Not as I know of; I understand he had a quack, I would not call him a physician; I understood that Dr. White, as he is called, had been there." That this evidence was reduced to writing by the surrogate, and filed in the surrogates' office; and thereupon this action was brought, the complaint in which contains two counts, one for libel, or for words written; and the other for slander, or for words spoken.

No point was made on the trial of the action, that the words alleged in the complaint had not been proved to have been spoken by the defendant, but a motion was made on his part to dismiss the complaint, substantially upon the ground that the words spoken by the defendant were not actionable, because they were spoken on his examination as a witness, and were spoken as pertinent and responsive to the questions asked him.

Justice Potter denied the motion to dismiss the complaint, and the defendant excepted.

In submitting to the jury the question, "whether the defendant, at the time he so testified and used the words in question, believed the words so used by him were relevant or pertinent to the question then on trial," Justice Potter charged the jury as follows: "That if the jury believed, from all the circumstances proved, from the questions put to him, and from his manner of answering, and from the answers themselves, that he testified in good faith, or in the belief that his answers were pertinent and relevant, then the law protected him in what he said; it was privileged, and their verdict should be for the defendant. That if, on the contrary, they should believe from this evidence, that the defendant, though testifying at the time as a witness, and as such entitled to the protection of the law, in so using the words proved, was actuated by malice; that he used the words for the mere purpose of defaming the plaintiff, then the law withdrew the protection it would otherwise have afforded him, and he became amenable to the consequences of uttering the slander, or of publishing the libel."

There is certainly some doubt whether the defendant's exception, which he claims applies to this part of the charge, was sufficiently specific or definite to raise the question as to its correctness; but I shall assume that it was; and I shall also assume, in view of what I have said preliminarily, as the counsel for the defendant assumed on the argument, and assumes in his points, that the only material questions presented by this appeal, are those presented by the two exceptions referred to.

Now, as to the first, it is perfectly clear, that the question, whether the defendant was protected under the circumstances, was not a ques-

tion of law for the court, but was a question of fact for the jury. It was really a question of conduct, of motive, of good faith and honest purpose, or of bad faith and malicious purpose.

The question was, whether the defendant did, or did not, avail himself of the occasion to maliciously answer the questions put to him as a witness, in the way he did.

This question was most emphatically a question for the jury; and, I think it was submitted to the jury as favorably for the defendant as he had a right to expect or ask.

It is true, that in submitting it to the jury, Justice Potter assumed that the defendant, when he answered the questions as he did, knew what the question in the proceeding before the surrogate was; but Justice Potter had a right to assume this under the circumstances.

I think the judgment should be affirmed, with costs.

All concur for affirmance.

*Judgment affirmed.*¹

¹ "White v. Carroll, rightly understood, is in harmony with the other cases. The case shows that the court held that the answer given to the question put to the defendant as a witness before the surrogate was not material and pertinent to the inquiry; and further held it was privileged if the defendant, when he gave it, in good faith believed that it was; and whether he so believed, was a question of fact to be determined by the jury. Had the evidence proved that the answer was material and pertinent, the court must have held it privileged, irrespective of the defendant's belief upon the subject." — *Per* GROVER, J., in *Marsh v. Ellsworth*, 50 N. Y. 309, 313.

"It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that their statements made in the course of an action must be pertinent and material to the case." — *Per* LORD, J., in *McLaughlin v. Cowley*, 127 Mass. 316, 319.

"The examination of witnesses is regulated by the tribunal before which they testify, and if witnesses answer pertinently questions asked them by counsel which are not excluded by the tribunal, or answer pertinently questions asked them by the tribunal, they ought to be absolutely protected. It is not the duty of a witness to decide for himself whether the questions asked him under the direction of the tribunal are relevant. As the witness is sworn to tell the whole truth relating to the matter concerning which his testimony is taken, he ought also to be absolutely protected in testifying to any matter which is relevant to the inquiry, or which he reasonably believes to be relevant to it. But a witness ought not to be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry, and which he does not believe to be relevant. This statement of the law, we think, is supported by the decisions in this Commonwealth. The English decisions, perhaps, go somewhat further than this in favor of a witness; certainly they apply the rule liberally for his protection." — *Per* FIELD, J., in *Wright v. Lothrop*, 149 Mass. 385, 389.

The principal case and the preceding extracts in this note represent the views of the American courts in general.

King v. McKissick, 126 Fed. 215; *Lawson v. Hicks*, 38 Ala. 379; *Wyatt v. Buell*, 47 Cal. 624; *Hollis v. Meux*, 69 Cal. 625; *People v. Green*, 9 Colo. 506; *Lester v. Thurmond*, 51 Ga. 118; *Buschbaum v. Heriot*, (Ga. 1909) 63 S. E. R. 645; *Spaids v. Barrett*, 57 Ill. 290; *Fagan v. Fries*, 30 Ill. Ap. 236; *Smith v. Howard*, 28 Iowa, 51; *Hawk v. Evans*, 76 Iowa, 593; *Forbes v. Johnson*, 11 B. Mon. 48; *Morgan v. Booth*, 13 Bush, 480; *Stewart v. Hall*, 83 Ky. 375; *Sebree v. Thompson*, 126 Ky. 223; *Kelly v. Lafitte*, 28 La. An. 435; *Gardemal v. McWilliams*, 43 La. An. 454; *Barnes v. McCrate*, 32 Me. 442; *Hyatt v. Wood*, 3 Met. 193;

Kidder v. Parkhurst, 3 All. 393; *McLaughlin v. Cowley*, 127 Mass. 316; *Wright v. Lathrop*, 149 Mass. 384; *Wheaton v. Beecher*, 49 Mich. 348; *Acre v. Starkweather*, 118 Mich. 214; *Hastings v. Lusk*, 22 Wend. 410; *Ring v. Wheeler*, 7 Cow. 725; *Garr v. Selden*, 4 N. Y. 91; *Marsh v. Ellsworth*, 50 N. Y. 309; *Moore v. Manufacturing Co.*, 123 N. Y. 420, 126 N. Y. 686; *Newfield v. Copperman*, 15 Abb. Pr. N. S. 360; *Perkins v. Mitchell*, 31 Barb. 461; *Dada v. Piper*, 41 Hun, 254; *McLaughlin v. Charles*, 60 Hun, 239; *Beggs v. McCrea*, 62 N. Y. Ap. Div. 39 (*semble*); *Suydam v. Moffatt*, 1 Sandf. 459; *Perzel v. Tousey*, 52 N. Y. Sup'r Ct. 79; *Cooper v. Phipps*, 24 Oreg. 357; *Shadden v. McElwee*, 86 Tenn. 146; *Mower v. Watson*, 11 Vt. 536; *Dunham v. Powers*, 42 Vt. 1; *Johnson v. Brown*, 13 W. Va. 71; *Jennings v. Paine*, 4 Wis. 358; *Calkins v. Sumner*, 13 Wis. 193; *Larkin v. Noonan*, 19 Wis. 82.

MESSAGE OF A MAYOR. A communication from the mayor of a city to the common council is absolutely privileged. *Trebilcock v. Anderson*, 117 Mich. 39.

OFFICIAL STATEMENTS OF OFFICERS OF STATE are absolutely privileged. *Chatterton v. Secretary of State*, [1895] 2 Q. B. 189. — ED.

SECTION VI.

Fair Comment or Criticism.

SIR JOHN CARR, KNIGHT, v. HOOD AND ANOTHER.

BEFORE LORD ELLENBOROUGH, LONDON SITTINGS AFTER TRINITY
TERM, 1808.

[Reported in 1 Campbell, 355, n.]

THE declaration stated, that the plaintiff, before the publishing of any of the false, scandalous, malicious, and defamatory libels therein-after mentioned, was the author of, and had sold for divers large sums of money, the respective copyrights of divers books of him the said Sir John, to wit a certain book entitled "The Stranger in France," a certain other book, entitled "A Northern Summer," a certain other book, entitled "The Stranger in Ireland," &c. which said books had been respectively published in 4to. yet that defendant intending to expose him to, and to bring upon him great contempt, laughter and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said Sir John, and of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled "My Pocket Book, or Hints for a Ryghte Merrie and conceited Tour, in quarto, to be called The Stranger in Ireland in 1805, (thereby alluding to the said book of the said Sir John, thirdly above mentioned,) by a knight errant (thereby alluding to the said Sir John)," and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2dly above mentioned, therein called, "Frontispiece," and entitled "The Knight (meaning the said Sir John) leaving Ireland with Regret," and containing and representing in the said print, a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket-handkerchief to his face, and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with, and bending under the weight of three large books, one of them having the word "Baltic," printed on the back thereof, &c. and a pocket-handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "wardrobe" depending therefrom, (thereby falsely, scandalously, and maliciously, meaning and intending to represent, for the

purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule, and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2dly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket-handkerchief,) and which said libel also contained, &c. &c. The declaration concluded by laying as special damage, that the said Sir John had been prevented and hindered from selling to Sir Richard Philips Knt. for a large sum of money to wit £600, the copyright of a certain book or work of him the said Sir John, of which the said Sir John was the author, containing an account of a tour of him the said Sir John through part of Scotland, which but for the publishing of the said false, scandalous, malicious, and defamatory libels, he the said Sir John would, could, and might have sold to the said Sir Richard Philips for the said last mentioned sum of money, and the same remained wholly unsold and undisposed of, and was greatly depreciated and lessened in value to the said Sir John. — Plea, not guilty.

LORD ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow, for the plaintiff, allowed, that when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed, it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeller, whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by the defendants clearly was, by means of immoderate ridicule to prevent the sale of the plaintiff's works, and entirely to destroy him as an author. In the late case of *Tipper v. Tabbart*¹ his lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libellous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and

¹ 1 Camp. 350.

errors of another may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's "Tour through Scotland" is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? but shall it be said that he might have sustained an action for defamation against that great philosopher, who was laboring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. — Reflection on personal character is another thing. Show me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sat here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

The *Attorney-General* having addressed the jury on behalf of the defendants —

LORD ELLENBOROUGH said, Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libellous; but no passage of this sort has been produced, and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for ought I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them. — to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. — I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he

was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold. — The CHIEF JUSTICE concluded by directing the jury, that if the writer of the publication complained of had not travelled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly. *Verdict for the defendants.*²

CAMPBELL v. SPOTTISWOODE.

IN THE QUEEN'S BENCH, APRIL 18, 1863.

[Reported in 3 *Best & Smith*, 769.]

COCKBURN, C. J.¹ I am of opinion that there ought to be no rule. The article on which this action is brought is undoubtedly libellous. It imputes to the plaintiff that, in putting forth to the public the sacred cause of the dissemination of religious truth among the heathen, he was acting as an impostor, and that his purpose was to put money into his own pocket by obtaining contributions to his newspaper. The article also charges that, in furtherance of that base and sordid purpose, he published in his newspaper the name of a fictitious person as the authority for his statements, and still further that, with a view to induce persons to contribute towards his professed cause, he published a fictitious subscription list. These are serious imputations upon the plaintiff's moral as well as public character.

It is said, on behalf of the defendant, that, as the plaintiff addressed himself to the public in a matter, not only of public, but of universal interest, his conduct in that matter was open to public criticism, and

¹ *Dibdin v. Swan*, 1 Esp. 28; *Heriot v. Stuart*, 1 Esp. 437; *Stuart v. Lovell*, 2 Stark. 93 (*semble*); *Tabart v. Tipper*, 1 Camp. 350 (*semble*); *Dunne v. Anderson*, Ry. & M. 287, 3 Bing. 88, s. c.; *Soane v. Knight*, M. & M. 74; *Thompson v. Shackell*, M. & M. 187; *Macleod v. Wakley*, 3 C. & P. 311; *Fraser v. Berkeley*, 7 C. & P. 621; *Evans v. Harlow*, Dav. & M. 507; *Paris v. Levy*, 9 C. B. N. S. 342; *Eastwood v. Holmes*, 1 F. & F. 347; *Hibbs v. Wilkinson*, 1 F. & F. 608; *Turnbull v. Bird*, 2 F. & F. 508; *Strauss v. Francis*, 4 F. & F. 939, 1107, 15 L. T. Rep. 674; *Henwood v. Harrison*, L. R. 7 C. P. 606; *Jenner v. A'Beckett*, L. R. 7 Q. B. 11; *Mulkern v. Ward*, 13 Eq. 619, 622; *Whistler v. Ruskin*, Odger's Lib. & Sl. (2 ed.) 49; *Duplany v. Davis*, 3 T. L. R. 184; *McQuire v. Western Co.* [1903] 2 K. B. 100; *Crane v. Waters*, 10 Fed. Rep. 619; *Snyder v. Fulton*, 34 Md. 128, 137; *Gott v. Pulsifer*, 122 Mass. 235; *O'Connor v. Sill*, 60 Mich. 175; *Dowling v. Livingstone*, 108 Mich. 321; *Cooper v. Stone*, 24 Wend. 434 (*semble*); *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, n. (*semble*); *Press Co. v. Stewart*, 119 Pa. 584 *Accord.* — ED.

² The statement of the case, the arguments of counsel, the judgment of MELLOR, J., and portions of the judgments of CROMPTON and BLACKBURN, JJ., are omitted. — ED.

I entirely concur in that proposition. If the proposed scheme were defective, or utterly disproportionate to the result aimed at, it might be assailed with hostile criticism. But then a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

In the present case, the charges made against the plaintiff were unquestionably without foundation. It may be that, in addition to the motive of religious zeal, the plaintiff was not wholly insensible to the collateral object of promoting the circulation of his newspaper, but there was no evidence that he had resorted to false devices to induce persons to contribute to his scheme. That being so, Mr. Bovill is obliged to say that, because the writer of this article had a *bona fide* belief that the statements he made were true, he was privileged. I cannot assent to that doctrine. It was competent to the writer to have attacked the plaintiff's scheme; and perhaps he might have suggested, that the effect of the subscriptions which the plaintiff was asking the public to contribute would be only to put money into his pocket. But to say that he was actuated only by the desire of putting money into his pocket, and that he resorted to fraudulent expedients for that purpose, is charging him with dishonesty: and that is going further than the law allows.

It is said that it is for the interests of society that the public conduct of men should be criticised without any other limit than that the writer should have an honest belief that what he writes is true. But it seems to me that the public have an equal interest in the maintenance of the public character of public men; and public affairs could not be conducted by men of honor with a view to the welfare of the country, if we were to sanction attacks upon them, destructive of their honor and character, and made without any foundation. I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable.¹ But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty, he is therefore justified in assailing his character as dishonest.²

¹ Hibbs v. Wilkinson, 1 F. & F. 608; Turnbull v. Bird, 2 F. & F. 508; Hunter v. Sharp, 4 F. & F. 983; Hunt v. Star Co. [1908] 2 K. B. 309; Walker v. Hodgson [1909] 1 K. B. 239, 253; De Mestre v. Syme, 9 Vict. L. R. (L.) 10; Davis v. Duncan, L. R. 9 C. P. 396; Queen v. Carden, 5 Q. B. D. 1, 8; Crane v. Waters, 10 Fed. Rep. 619; Kinyon v. Palmer, 18 Iowa, 377; Bradford v. Clark, 90 Me. 296; People v. Glassman, 12 Utah, 238; Accord. — Ed.

² Stuart v. Lovell, 2 Stark, 93; Macleod v. Wakley, 3 C. & P. 311; Green v. Chap-

The cases cited do not warrant us in going that length. In *Paris v. Levy*¹ there may have been an honest and well-founded belief that the man who published the handbill which was commented upon could only have had a bad motive in publishing it, and if the jury were of that opinion, the writer who attacked him in the public press would be protected. We cannot go farther than that.

CROMPTON, J. I am of the same opinion.¹ . . . The first question is, whether the article on which this action is brought is a libel or no libel, — not whether it is privileged or not. It is no libel, if it is within the range of fair comment, that is, if a person might fairly and *bona fide* write the article; otherwise it is. It is said that there is a privilege, not to writers in newspapers only, but to the public in general, to comment on the public acts of public men, provided the writer believes that what he writes is true; in other words, that this belongs to the class of privileged communications, in which the malice of the writer becomes a question for the jury; that is, where, from the particular circumstances or position in which a person is placed, there is a legal or social duty in the nature of a private or peculiar right, as opposed to the rights possessed by the community at large, to assert what he believes. In these cases of privilege there is an exemption from legal liability in the absence of malice; and it is necessary to prove actual malice. But there is no such privilege here. It is the right of all the Queen's subjects to discuss public matters; but no person can have a right on that ground to publish what is defamatory merely because he believes it to be true. If this were so, a public man might have base motives imputed to him without having an opportunity of righting himself. Therefore it is necessary to confine privilege, as the law has always confined it, to cases of real necessity or duty, as that of a master giving a servant a character, or of a person who has been robbed charging another with robbing him. Though the word "privilege" is used loosely in some of the cases as applied to the right which every person has to comment on public matters, I think that in all the cases cited the real question was whether the alleged libel was a fair comment such as every person might make upon a public matter, and if not, there was no privilege.

BLACKBURN, J. I also think that the law governing this case is so clearly settled that we ought not to grant a rule. It is important to bear in mind that the question is, not whether the publication is privileged, but whether it is a libel. The word "privilege" is often used loosely, and in a popular sense, when applied to matters which are not,

man, 4 Bing. N. C. 92; *Parmiter v. Coupland*, 6 M. & W. 105; *Whistler v. Ruskin*, Odger's Lib. & SL (2d ed.) 49; *Wilson v. Reed*, 2 F. & F. 149; *Morrison v. Belcher*, 3 F. & F. 614; *Hedley v. Barlow*, 4 F. & F. 224; *Risk Allah Bey v. Whitehurst*, 18 L. T. Rep. 615; *Joynt v. Cycle Co.* [1904], 2 K. B. 292; *Massie v. Toronto Co.*, 11 Ont. 362; *Burt v. Advertiser Co.*, 184 Mass. 238; *Cooper v. Stone*, 24 Wend. 434; *Reade v. Sweetzer*, 6 Abb. Pr. N. S. 9, n.; *Ullrich v. N. Y. Co.*, 23 N. Y. Mis. Rep. 168 *Accord.* — Ed.

¹ 2 F. & F. 71.

properly speaking, privileged. But, for the present purpose, the meaning of the word is that a person stands in such a relation to the facts of the case that he is justified in saying or writing what would be slanderous or libellous in any one else. For instance, a master giving a character of a servant stands in a privileged relation; and the cases of a memorial to the Lord Chancellor or the Home Secretary on the conduct of a justice of the peace, *Harrison v. Bush*, and of a statement to a public functionary, reflecting upon some public officer, *Beatson v. Skene*,¹ rank themselves under that class. In these cases no action lies unless there is proof of express malice. If it could be shown that the editor or publisher of a newspaper stands in a privileged position, it would be necessary to prove actual malice. But no authority has been cited for that proposition;² and I take it to be certain that he has only the general right which belongs to the public to comment upon public matters, for example, the acts of a minister of state; or, according to modern authorities somewhat extending the doctrine, where a person has done or published anything which may fairly be said to invite comment, as in the case of a handbill or advertisement; *Paris v. Levy*.³ In such cases every one has a right to make fair and proper comment; and, so long as it is within that limit, it is no libel.

The question of libel or no libel, at least since Fox's Act (32 G. 3, c. 60), is for the jury; and in the present case, as the article published by the defendant obviously imputed base and sordid motives to the plaintiff, that question depended upon another, — whether the article exceeded the limits of a fair and proper comment on the plaintiff's prospectus; and this last question was therefore rightly left to the jury. Then Mr. Bovill asked that a further question should be left to them, viz. whether the writer of the article honestly believed that it was true; and the jury have found that he did. We have to say whether that prevents an action being maintained. I think not. *Bona fide* belief in the truth of what is written is no defence to an action; it may mitigate the amount, but it cannot disentitle the plaintiff to damages.

Rule refused.

MERIVALE v. CARSON.

IN THE COURT OF APPEAL, DECEMBER 1, 2, 1887.

[*Reported in Law Reports, 20 Queen's Bench Division, 275.*]

APPEAL by the defendant against the refusal of a divisional court (Mathew and Grantham, JJ.) to allow a new trial of the action, or to enter judgment for the defendant.

¹ 5 H. & N. 838.

² But see, *contra*, *Williams v. Spowers*, 8 Vict. L. R. (L.) 82. — Ed.

³ 2 F. & F. 71.

The action was brought to recover damages in respect of an alleged libel. At the trial before Field, J., it appeared that the plaintiff and his wife were the joint authors of a play called "The Whip Hand." The defendant was the editor of a theatrical newspaper called "The Stage." Early in May, 1886, the play was performed at a theatre in Liverpool. On May 7 a criticism of the play was published in the defendant's newspaper. The part of the article charged in the statement of claim as libellous was as follows: "'The Whip Hand,' the joint production of Mr. and Mrs. Herman Merivale, gives us nothing but a hash-up of ingredients which have been used *ad nauseam*, until one rises in protestation against the loving, confiding, fatuous husband with the naughty wife and her double existence, the good male genius, the limp aristocrat, and the villainous foreigner. And why dramatic authors will insist that in modern society comedies the villain must be a foreigner, and the foreigner must be a villain, is only explicable on the ground, we suppose, that there is more or less of romance about such gentry. It is more in consonance with accepted notions that your Continental croupier would make a much better fictitious prince, marquis, or count than would, say, an English billiard-maker or stable-lout. And so the Marquis Colonna in 'The Whip Hand' is offered up by the authors upon the altar of tradition and sacrificed in the usual manner when he gets too troublesome to permit of the reconciliation of husband and wife, and lover and maiden, and is proved, also much as usual, to be nothing more than a kicked-out croupier." The innuendo suggested was that the article implied that the play was of an immoral tendency.

It was admitted that there was no adulterous wife in the play.

Field, J., in the course of his summing-up to the jury, said: "The question is, first, whether this criticism bears the meaning which the plaintiffs put upon it. If it is a fair temperate criticism, and does not bear that meaning, or is not fairly to be read as having that meaning, then your verdict will be for the defendants. . . . It is not for a moment suggested by any one that the defendant is animated by the smallest possible malice towards the plaintiffs. There is no ground for saying so, and no one has said so. . . . The malice which is necessary in this action is one, which, if it existed at all, will be because the defendant has exceeded his right of criticism upon the play. You have the play before you, you must judge for yourselves. If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendant. It is for the plaintiffs to make out their case. They have to satisfy you that it is more than that, otherwise they cannot complain. If you are satisfied upon the evidence that it is more than that, then you will give your verdict for the plaintiffs."

The jury found a verdict for the plaintiffs with one shilling damages, and the judge entered judgment for the plaintiffs accordingly, and declined to deprive them of costs.

The defendant appealed.

Cock, Q. C., and *W. Blake Odgers*, for the defendant.

Lockwood, Q. C., and *Bozall*, for the plaintiffs.¹

LORD ESHER, M. R. This action is brought in respect of an alleged libel contained in a criticism by the defendant upon a play written by the plaintiffs. The first thing to be considered is, what are the questions which in such a case ought to be left to the jury. The first question to be left to them is, what is the meaning of the alleged libel? The jury must look at the criticism, and say what in their opinion any reasonable man would understand by it. I am not prepared to say that in coming to their conclusion they would not also have to look at the work criticised. That, however, is not very material for us to consider now. The proper question was put to the jury in the present case. Two interpretations of the defendant's article were placed before them. One was that it meant that the play is founded upon adultery, without containing any stigma on the fact that it is so founded. The defendant's article is alleged to be libellous in that it attributed to the plaintiffs that they had written a play founded upon adultery, without any objection to it on their part, in other words, that they had written an immoral play. On behalf of the defendant it was said that the article had no such meaning, that the expression "naughty wife" does not mean "adulterous wife." It would not have that meaning in every case, but the question is whether, looking at the context of the article, it has that meaning. If the court should come to the conclusion that the expression could not by any reasonable man be thought to have that meaning, they could overrule the verdict of the jury; otherwise the question is for the jury.

What is the next question to be put to the jury? Are they to be told that the criticism of a play is a privileged occasion, within the well-settled meaning of the word "privilege," and that their verdict must go for the defendant, unless the plaintiff can prove malice in fact, that is, that the writer of the article was actuated by an indirect or malicious motive? I think it is clear that that is not the law, and that it was so decided in *Campbell v. Spottiswoode*, which has never been overruled. All the judges, both before and ever since that case, have acted upon the view there expressed, that a criticism upon a written published work is not a privileged occasion. Blackburn, J., in his judgment, shows why it is not a privileged occasion. A privileged occasion is one on which the privileged person is entitled to do something which no one who is not within the privilege is entitled to do on that occasion. A person in such a position may say or write about another person things which no other person in the kingdom can be allowed to say or write. But, in the case of a criticism upon a published work, every person in the kingdom is entitled to do, and is forbidden to do exactly the same things, and therefore the occasion is not privileged. Therefore the second question to be put to the jury is,

¹ The arguments of counsel are omitted. — Ed.

whether the alleged libel is or is not a libel. The form in which that question should be put is, I think, best expressed by Crompton, J., in *Campbell v. Spottiswoode*. He says: "Nothing is more important than that fair and full latitude of discussion should be allowed to writers upon any public matter, whether it be the conduct of public men, or the proceedings in courts of justice, or in Parliament, or the publication of a scheme, or a literary work. But it is always to be left to a jury to say whether the publication has gone beyond the limits of a fair comment on the subject-matter discussed. A writer is not entitled to overstep those limits, and impute base and sordid motives which are not warranted by the facts, and I cannot for a moment think, because he has a *bona fide* belief that he is publishing what is true, that is any answer to an action for libel." He says that upon the answer to the question there stated it depends whether the article upon which the action is brought is or is not a libel. The question is not whether the article is privileged, but whether it is a libel. What is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the work in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon the circumstances of the particular case. I think the right question was really left by Field, J., to the jury in the present case. No doubt you can find in the course of his summing-up some phrases which, if taken alone, may seem to limit too much the question put to the jury. But, when you look at the summing-up as a whole, I think it comes in substance to the final question which was put by the judge to the jury: "If it is no more than fair, honest, independent, bold, even exaggerated, criticism, then your verdict will be for the defendants." He gives a very wide limit, and, I think, rightly. Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this:  Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised? If it goes beyond that, then you must find for the plaintiff; if you are not satisfied that it does, then it falls within the allowed limit, and there is no libel at all. I cannot doubt that the jury were justified in coming to the conclusion to which they did come, when once they had made up their minds as to the meaning of the words used in the article, viz. that the plaintiffs had written an obscene paper; and no fair man could have said that. There was there-

fore a complete misdescription of the plaintiffs' work, and the inevitable conclusion was that an imputation was cast upon the characters of the authors. Even if I had thought that the right direction had not been given to the jury, I should have declined to grant a new trial, for the same verdict must inevitably have been found if the jury had been rightly directed.

Another point which has been discussed is this: It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author.

In my opinion this appeal must be dismissed.

BOWEN, L. J. We must begin with asking ourselves, what is the true meaning of the words used in the alleged libel? We have the benefit of the machinery which the law gives — the verdict of a jury — for ascertaining the meaning, and it must now be taken to have been conclusively settled, that the writer of the criticism has imputed to the plaintiffs that the story of their play turns in its main incident upon an adulterous wife, and in such a way as not to lead any one to suppose that the plaintiffs objected to the adultery, but, on the contrary, that they had treated the adultery as a spicy incident in the play, without expressing any opinion as to its morality. It has been admitted by the defendant that the play does not in fact contain any adulterous wife, that there is no incident of adultery in it, and therefore it is not open to the suggestion that the plaintiffs have treated adultery lightly in such a way as to tend to immorality. These are the facts.

What then is the law applicable to them? We must see, first, what is the question which ought to have been left to the jury on this assumption of the meaning of the article, and then whether it was in fact left to them, and whether there was any miscarriage on their part. I take precisely the same view as the Master of the Rolls with regard to the way in which the word "privilege" ought to be used. The present case is not, strictly speaking, one of "privileged occasion." In a legal sense that term is used with reference to a case in which one or more members of the public are clothed with a greater immunity than the rest. But in the present case we are dealing with a common right of public criticism which every subject of the realm equally enjoys, — the right of publishing a written criticism upon a literary work which is offered to public criticism.

It is true that a different metaphysical exposition of this common right is to be found in the judgment of Willes, J., in *Henwood v. Har-*

rison,¹ that learned judge and the majority of the Court of Common Pleas seem to have treated this right as a branch of the general law of privilege, and to have found a justification for the use of the word "privilege" in the subject-matter of the criticism, although there is no limit of the number of the persons entitled to make the criticism. With great respect to Willes, J., I agree with the Master of the Rolls that this is not so good an exposition of the right as that which is given by Blackburn, J., and Crompton, J., in *Campbell v. Spottiswoode*. But the question is rather academical than practical, for I do not think it would make any substantial difference in the present case which view was the right one. But, among other reasons, why I prefer the view of Blackburn, J., and Crompton, J., is this, that it leaves undisturbed the mode of directing the jury in cases of this class which has been ordinarily adopted, viz., to begin by asking them whether they think the limits of fair criticism have been passed. That implies that there is no libel if those limits are not passed. It is only when the writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all. This leaves unsettled the inquiry, and perhaps it was intended in *Campbell v. Spottiswoode* (a case which has never been questioned) to leave it unsettled, what is the standard for the jury of "fair criticism"? The criticism is to be "fair," that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair," and, although we cannot find in any decided case an exact and rigid definition of the word "fair," this is because the judges have always preferred to leave the question what is "fair" to the jury. The nearest approach, I think, to an exact definition of the word "fair" is contained in the judgment of Lord Tenterden, C. J., in *Macleod v. Wakley*,² where he said, "Whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable; unless it appears that, under the pretext of criticising the works, the defendant takes an opportunity of attacking the character of the author: then it will be a libel." It must be assumed that a man is entitled to entertain any opinion he pleases, however wrong, exaggerated, or violent it may be, and it must be left to the jury to say whether the mode of expression exceeds the reasonable limits of fair criticism.

In the case of literary criticism it is not easy to conceive what would be outside that region, unless the writer went out of his way to make a personal attack on the character of the author of the work which he was criticising. In such a case the writer would be going beyond the limits of criticism altogether, and therefore beyond the limits of fair criticism. *Campbell v. Spottiswoode* was a case of that kind, and there the jury were asked whether the criticism was fair, and they were told

¹ Law Rep. 7 C. P. 606.

² 3 C. & P., at p. 313.

that, if it attacked the private character of the author, it would be going beyond the limits of fair criticism. Still there is another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism, — I mean if he imputes to the author that he has written something which in fact he has not written. That would be a misdescription of the work. There is all the difference in the world between saying that you disapprove of the character of a work, and that you think it has an evil tendency, and saying that a work treats adultery cavalierly, when in fact there is no adultery at all in the story. A jury would have a right to consider the latter beyond the limits of fair criticism.

Applying the law to the present case, we have to see whether the learned judge misdirected the jury, having regard to their finding as to the true construction of the article. Their construction of the words of the article could not have been affected by what he said to them about the meaning of "fair criticism." The alleged libel stated that the story of the plaintiffs' play turned upon adultery. In a case of manifest misdescription such as this the judge is not bound to go into all the minutiae as if the libel had been of a different character, and his summing-up must be read with reference to this fact. I have read through the summing up of Field, J., and, though I do not think that his language was altogether exact, yet what possible harm could it have done having regard to the facts of the case? The jury had to deal with a case of positive misdescription, a question not of opinion, but of fact. Did not that fall clearly beyond the limits of fair criticism? Could this court since the Judicature Act set aside the verdict of the jury, merely because the language of the learned judge was not exactly that which he would have used if he had written his summing-up? Assuming the interpretation the jury put on the meaning of the words to be correct, as we must assume, I entertain no doubt as to the correctness of the remainder of the verdict. And, even if the view of the law as to privilege which I do not adopt were the right view, I do not think it would make any difference in the present case, because, the misrepresentation being clear, the writer having not merely said that the play had an evil tendency, but having imputed to the authors that it was founded on adultery when there is no adultery at all in it, the jury would have inferred, if the question had been left sufficiently to them, that the writer was actuated by a malicious motive; that is to say, by some motive other than that of a pure expression of a critic's real opinion.

Appeal dismissed.

THOMAS v. BRADBURY, AGNEW & CO., ET AL.

COURT OF APPEAL, JUNE 25, 1906.

[1906. 2 King's Bench Division, 627.]

APPLICATION by the defendants for a new trial or that judgment should be entered for them in an action for libel tried before Darling, J., with a jury.

The alleged libel was the following review in *Punch* of the plaintiff's book:—

“MANGLED REMAINS.

“*Extract from the Recess Diary of Toby, M. P.*

“Been reading ‘Fifty Years of Fleet Street’ just issued by Macmillan. Purports to be the ‘Life and Recollections of Sir John Robinson,’ the man who made, and for a quarter of a century maintained at high level, the *Daily News*. The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don José, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered, and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume. ‘I have not thought it necessary or desirable,’ he writes, ‘to indicate in all cases what is his (Sir John Robinson's) and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should have the credit of it. The dulness I take upon myself.’ Here be generosity! Here magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from this high estate. More than once he airily alludes to ‘our diary’ and ‘our notes,’ as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of this indiscretion, and reverting to more generous mood, he, approaching a particular narrative, introduces it with the remark, ‘the incident may be given in the diarist's own words.’ The procedure is perhaps not unusual with earlier biographers. With Mr. Thomas the relapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest, it is Mr. Thomas who *loquitur*, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humour, his gift of graphic characterization. The worst of it is that, happening in the very same

page upon some banal remark, some pompous platitude, the alarmed reader, recognizing Mr. Thomas, hastily turns over half-a-dozen pages, and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see, from the few un mutilated extracts from Robinson's manuscript which illuminate the book, that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the *Daily News* lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sympathies were bountifully wide, his observation alert, his sense of humour keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet Street were worth a cycle of Cathay. That he habitually made notes of what he saw and heard with the view to publication in biographical form is undoubted. Mr. Thomas, impregnable in the chain armour of complacency, positively admits it. 'Robinson,' he says, 'did leave some diaries — our diaries — more or less fragmentary, and a number of thick, closely-written volumes of jottings in his own handwriting, descriptive of events of which he had been an eye-witness and people he had seen and known.' Where is this treasure trove? Presumably portions the biographer was good enough to regard as worth adapting are filtered through the wordy pages of larger type. Happily the material is so good, its original literary form so excellent, that even this unparalleled atrocity cannot quite spoil the book. We who knew Robinson on his throne in Bouverie Street and at the well-known table in the dining-room of the Reform Club, rich in recollections of William Black, Payn, and Sala; who watched him enjoying himself like a boy at theatre first nights; who recognized his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations — we, perhaps jealously, cherish his memory, and regret the surprising chance that has made possible this slight upon it."

The defence admitted that the defendant Lucy wrote, and that the other defendants published, the words complained of, and pleaded that the words were incapable of a defamatory meaning; and further, that they were written for publication and were published as a criticism and fair comment upon the plaintiff's book without any malice towards the plaintiff, and were a fair and *bona fide* criticism and comment upon the book which was a matter of public interest.

At the trial the plaintiff's case was, first, that the language of the review itself was such as to furnish evidence that the writer was not in truth criticising the book, but was maliciously attacking the author; and, secondly, that there was evidence outside the review that the defendant Lucy, in writing the criticism, was actuated by malice towards the plaintiff. As extrinsic evidence of malice the plaintiff relied upon the strained relations between Lucy and himself before the criticism was published; on the fact that the criticism was published

as a separate article under the heading "Mangled Remains," and was not included in that part of the journal usually devoted to reviews of books under the heading "Our Booking Office"; and on the answers and demeanor of Lucy in the witness-box at the trial. At the close of the plaintiff's case counsel for the defendants submitted that there was no case to go to the jury, upon the grounds that the article was incapable of a defamatory meaning, and that there was no evidence that it exceeded the limits of fair comment.

The learned judge declined to withdraw the case from the jury, who found a verdict for the plaintiff with 300*l.* damages.

The defendants appealed.¹

Cur. adv. vult.

June 25. COLLINS, M. R., read the following judgment: This is an appeal by the defendants from the verdict and judgment for the plaintiff in an action of libel, tried before Darling, J., and a special jury, based on a critique of a book written by the plaintiff. The critique was written by the defendant Lucy, and appeared in *Punch*, of which the first defendants are the publishers. The defence was fair comment. The learned judge refused to withdraw the case from the jury, who found for the plaintiff, with 300*l.* damages. The defendants do not complain of misdirection other than that involved in holding that there was any evidence fit for the consideration of a jury. They ask for judgment on the ground that there was nothing in the article which any reasonable jury could find to fall outside the limits of fair comment, or in the alternative they ask for a new trial on the ground that the verdict was against the weight of evidence.

The defendants pressed us strongly with the case of *McQuire v. Western Morning News Co.*,² a decision of this court in an action for libel in respect of an article criticising adversely a play of which the plaintiff was the author, where the court set aside a verdict and judgment for the plaintiff on the ground that there was no evidence on which a rational verdict for the plaintiff could be founded. There were, however, two distinctions between that case and the present. There was admittedly in that case no evidence of actual malice unless it could be inferred from the terms of the article itself, and there was some reason for supposing that the direction was misleading. In the present case the plaintiff's counsel strenuously contended that there was extrinsic evidence of malice in the proved relations of the parties before the action; the special manner in which the particular article appeared in *Punch*; and in the expressions which fell from the defendant Lucy, coupled with his demeanor in the witness-box, and they relied also on the terms of an apology subsequently printed as fortifying their contention. They urged besides that the language of the article itself raised a question for the jury as to its meaning, and that

¹ The statement has been abridged, and the arguments of counsel together with a small portion of the judgment are omitted. — Ed.

² [1903] 2 K. B. 100.

upon their view of its meaning would depend the question whether it exceeded the bounds of fair comment or not. The question, therefore, for our decision is whether there was any evidence upon which a rational verdict for the plaintiff could be founded. If so, the learned judge was bound to leave it to the jury. I have already said that extrinsic evidence of malice, which I have attempted to summarize, was allowed to go to the jury. The defendants contended that this evidence amounted to nothing, and that no reasonable jury could act upon it, but they also raised a contention which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticised. It involves the position also that an action based on criticism is wholly outside the ordinary law of libel, of which malice express or implied, has always been considered to be the gist.

The basis of this contention, such as it is, appears to be a misconception of the effect of the gloss, if I may so phrase it, first put upon the law of libel in relation to fair comment in the dicta of Crompton, J., and Blackburn, J., in *Campbell v. Spottiswoode*, decided in 1863, and subsequently approved in *Merivale v. Carson*, decided in 1887. I have already had occasion to examine the effect of these views upon the law of libel in *McQuire v. Western Morning News Co.*¹ In my opinion the substance of the matter remains unchanged and malice remains exactly where it did. The dicta no doubt assert the etymological inexactitude of the word "privilege" as connoting a right common to the public at large, and the limits of the right itself are pointed out which, whether it be called privilege or by any other name, does not extend to cover misstatements of fact however *bona fide*;² but they

¹ [1903] 2 K. B. 100.

² *Merivale v. Carson*, *supra*, 465; *McQuire v. Western Co.*, [1903] 2 K. B. 100, 110; *Joynt v. Cycle Co.*, [1904] 2 K. B. 292; *Digby v. Financial News*, [1907] 1 K. B. 502; *Hunt v. Star Co.*, [1908] 2 K. B. 309, 317; *Walker v. Hodgson*, [1909] 1 K. B. 239 *Accord*.

In the case last cited Kennedy, L. J., said, p. 256: "Now it is true that there may be comment of an injurious nature in which there is no statement of facts, or which refers to facts which are admitted or are indisputable. In such a case the fairness of the comment depends upon the character of the criticisms, or the inferences of which it is composed, that is, whether it is a comment made honestly and *bona fide*, or a comment made *mala fide* and maliciously. . . . But where the words which are alleged to be defamatory allege, or assume as true, facts concerning the plaintiff which the plaintiff denies, and which either involve a slanderous imputation in themselves, or upon which the comment bases imputations or inferences injurious to the plaintiff, it is, I think, settled law that the defence of fair comment fails, unless the comment is truthful in regard to its allegation or assumption of such facts." See also the remarks of Buckley, L. J., in the same case, p. 253. — ED.

in no degree affect the standard by which the fairness of the comment is to be judged or relieve the commentator from liability, if the comment be malicious, if, indeed, it can then be described as comment at all. The right, though shared by the public, is the right of every individual who asserts it, and is, qua him, an individual right whatever name it be called by, and comment by him which is colored by malice cannot from his standpoint be deemed fair. He, and he only, is the person in whose motives the plaintiff in the libel action is concerned, and if he, the person sued, is proved to have allowed his view to be distorted by malice, it is quite immaterial that somebody else might without malice have written an equally damnatory criticism. The defendant, and not that other person, is the party sued. This seems to me quite clear in point of principle; but, as already pointed out in *McQuire v. Western Morning News Co.*,¹ the law continued to be administered after *Campbell v. Spottiswoode*, just as it always had been before, down to and since *Merivale v. Carson*. That case decided nothing inconsistent with the law of libel as thus administered, though each of the learned judges expressed an opinion in favor of the view taken in the dicta I have referred to of Crompton, J., and Blackburn, J., in preference to that of Willes, J., in *Henwood v. Harrison*.² But, as already pointed out in *McQuire v. Western Morning News Co.*,³ the difference between the two views is, in the language of Bowen, L. J., in *Merivale v. Carson*, a difference in the "metaphysical exposition" of the right and "is rather academical than practical." I think the head-note in the last-mentioned case is to some extent the cause of what seems to me an erroneous impression as to the effect of the decision. The words of that note seem to suggest a difference of right, under the general law of libel, in respect of communications made on a privileged occasion and communications made in the shape of criticism on a matter of public interest. In cases of privilege, properly so called, nothing that falls outside the privilege is protected by it, and if defamatory it must be otherwise justified. The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public, and not one limited to an individual or a class. The extent of the right has to be ascertained, and in respect of any communication which falls within it the immunity, if it be not absolute, can be displaced only by proof of malice. In the case of comment on literary works the occasion is created by the publication, and a right then arises to criticise honestly, however adversely. No such occasion would arise in respect of a private unpublished letter. If a writer were to get hold of a private letter of a well-known author and publish a damnatory article on the author's literary style and taste, as evidenced by the letter, it seems to me that he would have no immunity from the ordinary law in re-

¹ [1903] 2 K. B. 100.² L. R. 7 C. P. 600.³ [1903] 2 K. B. 100.

spect of defamatory writings. The only difference, then, in the legal incidents of ordinary privilege, limited to individuals on the one hand and the right in the public to criticise on the other, would seem to be that the one might, with somewhat less latitude than the other, though not, perhaps, with perfect accuracy, be described as "privilege." Now, the head-note might possibly suggest, at first sight at all events, particularly when it adds "*Henwood v. Harrison*¹ dissented from," that not merely an academical difference in the analysis of rights had been expressed, but that there was a difference of substance in the bearing of malice in the two cases in respect of communications or criticisms falling *prima facie* within the right or privilege. The limits of the right, as I have already pointed out, may be, and are, different, but the law with respect to communications that *prima facie* fall within them is the same. Proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege. The particular allegation which was unprotected in *Merivale v. Carson* was never within the "right" when the facts were ascertained by the jury in interpreting the passage impugned. Proof of *bona fide* belief was therefore irrelevant; nothing but proof of the truth could justify the allegation. If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission, on the part of the plaintiff, implied from the averment by him of publication of the work criticised, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing *prima facie* unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called. Beginning thus at this stage in the transaction, he would have accepted the onus of proving malice in fact. If he had veiled the fact that the writing criticised had become matter of public interest by publication it would have been *prima facie* libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest in order to bring himself within the protection. This shows that acceptance of the dicta under discussion does not in the slightest degree affect the place of malice in the law of libel, and that it is only by leaving out one step in the analysis that the public right, as distinguished from the privilege, may appear to carry with it different incidents. There is not even any decision that the word privilege, as used in *Henwood v. Harrison*,² to which Lord Esher was himself a party, is not as good a word as any substitute that can be suggested to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of

¹ L. R. 7 C. P. 606.² L. R. 7 C. P. 606.

malice is negated. For the reasons I have given the difference is one of words only, and could not be a matter of legal decision.

I have thought it worth while to sift this contention somewhat elaborately, as it is apparently based upon a misconception which seems to have a tendency to repeat itself as to the effect of *Merivale v. Carson*, on the law of libel. But the contention of the defendants can be met, not by reference to principle only, but also by direct authority. To go back to the source itself of the supposed new departure, *Campbell v. Spottiswoode, Blackburn, J.*, says: "Honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment." In *Merivale v. Carson* itself Lord Esher, M. R., deals with the question. He says: "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shown that the defendant was not really criticising the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author." Though the learned judge in this passage expresses only an inclination of opinion, the reason given seems to me to be conclusive. But in a very recent case in this court, the point is actually decided: *Plymouth Mutual Coöperative and Industrial Society v. Traders' Publishing Association*.¹ The question there was whether an interrogatory addressed to the state of mind of the defendant, who had pleaded fair comment in an action of libel, was admissible. The court decided that it was, following a previous decision of this court in a case of privilege strictly so called. *Vaughan Williams, L. J.*, referring to *White & Co. v. Credit Reform Association and Credit Index*,² says at page 413 of the report: "It seems to me that that case shows that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. In either case, I think such an interrogatory as the one now in question is admissible." *Fletcher Moulton, L. J.*, says at page 418 of the report: "I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue."

It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his

¹ [1906] 1 K. B. 403.

² [1905] 1 K. B. 653.

literary merits; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible, and that the learned judge was right in letting the evidence in this case go to the jury. But I am also of opinion on a close examination of the alleged libel that, apart from the extrinsic evidence of malice, the learned judge could not have withdrawn the case from the jury. One point made by the plaintiff would, I think, of itself suffice to establish this position. The defendant Lucy says in the alleged libel "it is plain to see from the few unmutilated extracts . . . that the materials at hand for a delightful biography were abundant." This statement was described by the plaintiff in a letter to the editor of *Punch* as "simply untrue." A short statement was thereupon published in the issue of December 7, in which the defendant, while accepting the plaintiff's statement as to the paucity of materials, quotes a passage from the preface to the book dealing with the existence of materials, and concludes thus: "Toby, M. P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that, accepting them in their ordinary sense, he received and conveyed an impression of Mr. Thomas's literary methods which turns out to have been erroneous." He is thus in the difficulty of having to admit a misstatement of fact in respect of which, to put it at the lowest, a question must arise for the jury whether the passage he relied upon justifies the statement. I think also that the learned judge could not have properly held that there was no evidence fit for the consideration of the jury as to some of the innuendoes averring imputations of discreditable motives. I am of opinion, therefore, that we could not direct judgment for the defendants without usurping the functions of the jury. Neither can we say that the evidence is so slight as to justify us in ordering a new trial on the ground that the verdict is against the weight of the evidence.

COZENS-HARDY, L. J. I agree.

SIR GORELL BARNES, PRESIDENT. I have had an opportunity of reading the judgment of the Master of the Rolls, and I agree with it.
Appeal dismissed.

DAVIS AND SONS, DEFENDANTS, AND SHEPSTONE, PLAINTIFF.

IN THE PRIVY COUNCIL, MARCH 5, 1886.

[Reported in 11 Appeal Cases, 187.]

THE judgment of their lordships was delivered by

LORD HERSCHELL, L. C.¹ This is an appeal from a judgment of the Supreme Court of the Colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for £500 damages.

The action was brought to recover damages for alleged libels published by the appellants in the "Natal Witness" newspaper in the months of March and May, 1883.

The respondent was, in December, 1882, appointed Resident Commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the respondent whilst in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing, "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnatory. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserved territory who had visited Cetewayo, and, what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail.

On the 16th of May, 1883, the appellants published a further article, relating to the respondent, which commenced as follows:—"Some time ago we stated in these columns that Mr. John Shepstone, whilst

¹ Only the opinion of the court is given. — Ed.

in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made, a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man."

The article then gave at length the statements so taken down, which disclosed, if true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the plaintiff as British Resident Commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the Governor of Natal, and published in the colony by messengers from Zululand and its king as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the plaintiff in his public capacity published *bona fide* and without malice.

The case came on for trial before Mr. Justice Wragg and a jury on the 4th of September, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their statements had been conveyed to the editor of a newspaper by a letter from the bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the king to the Governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for £500.

Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds, first, that the learned judge misdirected the jury in leaving to them the question of privilege and in not telling them that the occasion was a privileged one. The second ground insisted upon was that the damages were excessive. Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the plaintiff could only succeed on proof of express malice, is not well founded.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.¹

¹ *Parmiter v. Coupland*, 6 M. & W. 105; *Odger v. Mortimer*, 28 L. T. Rep. 472; *Queen v. Carden*, 5 Q. B. D. 1, 8; *Bryce v. Rusden*, 2 T. L. R. 435; *Duplany v. Davis*, 3 T. L. R. 184; *R. v. Flowers*, 44 J. P. 377, *per* FIELD, J.; *LeFroy v. Burnside*, L. R. 4 Ir. 556, 565, 566; *Broadvest v. Small*, 2 Vict. L. R. 121; *Stewart v. McKinley*, 11 Vict. L. R. 802; *Brown v. McKinley*, 12 Vict. L. R. 240; *Smith v. Tribune Co.*, 4 Biss. 477; *McDonald v. Woodruff*, 2 Dill. 244; *Hallam v. Post Co.*, 55 Fed. 456, 59 Fed. 530; *Jarman v. Rea*, 137 Cal. 339; *Dauphay v. Buhne*, 153 Cal. 757; *Star Co. v. Donahoe*, (Del. 1904) 58 Atl. R. 513; *Jones v. Townsend*, 21 Fla. 431; *Rearick v. Wilcox*, 81 Ill. 77; *Klos v. Zahorik*, 137 Iowa, 161; *Beare v. Bass*, 88 Me. 521; *Negley v. Farrow*, 60 Md. 158; *Commonwealth v. Clap*, 4 Mass. 163, 169 (*semble*); *Curtis v. Mussey*, 6 Gray, 261; *Burt v. Advertiser Co.*, 154 Mass. 238 (compare *Sillars v. Collier*, 151 Mass. 50); *Hubbard v. Allyn*, 200 Mass. 166; *Foster v. Scripps*, 39 Mich. 376; *Bronson v. Bruce*, 59 Mich. 467; *Bourresseau v. Detroit Co.*, 63 Mich. 425; *Wheaton v. Beecher*, 66 Mich. 307; *Belknap v. Ball*, 83 Mich. 588; *Hay v. Reid*, 85 Mich. 296; *Smurthwaite v. News Co.*, 124 Mich. 377; *Aldrich v. Press Co.*, 9 Minn. 183 (but see, *contra*, *Marks v. Baker*, 28 Minn. 162); *Smith v. Burrus*, 106 Mo. 94; *State v. Schmitt*, 49 N. J. 579; *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613; *Littlejohn v. Greeley*, 13 Abb. Pr. 41; *Hamilton v. Eno*, 81 N. Y. 116; *Mattice v. Wilcox*, 147 N. Y. 624; *Ullrich v. N. Y. Co.*, 23 N. Y. Misc. Rep. 168; *Seeley v. Blair*, *Wright* (Oh.) 358, 683; *Post Co. v. Muloney*, 50 Oh. St. 71; *Upton v. Hume*, 24 Oreg. 431; *Barr v. Moore*, 87 Pa. 385; *Brewer v. Weakley*, 2 Overt. 99; *Banner Co. v. State*, 16 Lea, 176; *Democrat Co. v. Jones*, 83 Tex. 302; *Sweeney v. Baker*, 13 W. Va. 158; *Spiering v. Andrae*, 45 Wis. 330; *Eviston v. Cramer*, 57 Wis. 570; *D. Ward v. Derrington*, 14 S. Aust. L. R. 35; *Hazelgrove v. King*, 14 S. Aust. L. R. 192 *Accord*.

Mott v. Dawson, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251 (but see *State v. Haskins*, 109 Iowa, 656, 658 and *Morse v. Printing Co.*, 124 Iowa, 707, 723; *State v. Belch*, 31 Kan. 465; *Coleman v. McLennan*, (Kan. 1908) 98 Pac. R. 281; *Marks v. Baker*, 28 Minn. 162; *State v. Burnham*, 9 N. H. 34; *Neeb v. Hope*, 111 Pa. 145; *Briggs v. Garrett*, 111 Pa. 404; *Press Co. v. Stewart*, 119 Pa. 584; *Ross v. Ward*, 14 S. Dak. 240; *Boucher v. Clark Co.*, 14 S. Dak. 72; *Jackson v. Pittsburgh Times*, 152 Pa. 406 *Contra*.

See *Palmer v. Concord*, 48 N. H. 211.

In *Burt v. Advertiser Co.*, *supra*, HOLMES, J., said: "But there is an important distinction to be noticed between the so-called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case, a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libellous, he will not be privileged if those facts are not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. In these, as in many other instances, the law has to draw a line between conflicting interests, both intrinsically meritorious. When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts, and those who settled the law thought it more important to preserve a reasonable freedom in giving necessary information than to insure people against occasional unintended injustice, confined as it generally is to

In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded, on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in parliament and in courts of justice are privileged, even though they contain defamatory matter affecting the character of individuals.

But in the case of *Purcell v. Sowler* the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor.

The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But

one or two persons. But what the interest of private citizens in public matters requires is freedom of discussion rather than of statement. Moreover, the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better, certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer. *Sheckell v. Jackson*, 10 Cush. 25, 26."

Public Men. — All participants in legal proceedings are legitimate subjects for comment if restricted to their conduct therein. *Rex v. White*, 1 Camp. 359; *Seymour v. Butterworth*, 3 F. & F. 372; *Hedley v. Barlow*, 4 F. & F. 224; *Woodgate v. Rideout*, 4 F. & F. 202; *Hibbins v. Lee*, 4 F. & F. 243; *Risk Allah Bey v. Whitehurst*, 18 L. T. Rep. 615; *Reg. v. Sullivan*, 11 Cox C. C. 44, 57; *Kane v. Mulvaney, Jr.* 2 C. L. 402; *Miner v. Detroit Co.*, 49 Mich. 358. See, also, *Kelly v. Tinling*, L. R. 1 Q. B. 699 (*Churchwarden*); *Harle v. Catterall*, 14 L. T. Rep. 801 (*Waywarden*).

Matters not of Public Interest. — The right of comment was denied in *Latimer v. Western Co.*, 25 L. T. Rep. 44; *Hogan v. Sutton*, 16 W. R. 126; *Wilson v. Fitch*, 41 Cal. 363.

See also *Hearne v. Stowell*, 12 A. & E. 719; *Gathercole v. Miall*, 15 M. & W. 319; *Walker v. Brogden*, 19 C. B. N. S. 65; *Booth v. Briscoe*, 2 Q. B. Div. 496. — Ed.

in their Lordships' opinion, so far as it erred, it erred in being too favorable to the appellants, and it is not open to any complaint on their part.

The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive or for interfering with the finding of the jury in this respect.

They will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

SECTION VII.

Conditional Privilege.

(a) PRIVILEGED REPORTS.

WASON v. WALKER.

IN THE QUEEN'S BENCH, NOVEMBER 25, 1868.

[Reported in *Law Reports*, 4 *Queen's Bench*, 73.]

THE judgment of the court was delivered by

COCKBURN, C. J.¹ This case was argued a few days since before my Brothers LUSH, HANNEN, and HAYES, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, *dicta* of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *Rex v. Wright*,² Lawrence, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate

¹ Only the opinion of the court is given.—ED.

² 8 T. R. 293.

unauthorized by the House. Again in *Davison v. Duncan*,¹ Wightman, J., seems disposed to treat the reports of proceedings in parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here again the question before the court had reference to a report, not of a proceeding in parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual had been assailed, and which report the court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in parliament. On the other hand, in *Stockdale v. Hansard*,² Littledale, J., and Patteson, J., use language from which it may be safely inferred that they would have deemed the report of a parliamentary debate, if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper, forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extrajudicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex v. Wright*³ approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. Lord Kenyon, C. J., says, "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now *sub judice*; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application."⁴ Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the char-

¹ 7 E. & B. 229.

² 8 T. R. 293.

³ 9 Ad. & E. 181-186, 212-214.

⁴ 8 T. R., at p. 296.

acter of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the authority of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either House, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex v. Lord Abington*,¹ and *Rex v. Creevey*,² in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex v. Wright*³ is much shaken, not only by the decision in *Rex v. Creevey*,² but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Beyond, however, impugning the authority of *Rex v. Wright*,³ the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

The case of *Lake v. King*,⁴ which was cited in the argument before us, has no application to the present case. There, a petition having been presented to the House of Commons by the defendant, impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the House, and it was held that, the printing and circulating petitions being according to the course and usage of parliament, no action would lie.

The case of *Stockdale v. Hansard*,⁵ which was much pressed upon us by the counsel for the defendant, is in like manner beside the question. In that case a report from the inspectors of prisons relative to the jail of Newgate, in which a work published by the plaintiff, a bookseller, and which had been permitted to be introduced into the prison, had been described as "of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the House in conformity with the Act of 5 & 6 Wm. 4, c. 38. In another report, being a reply to a report of the court of aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers, to whom they (the inspectors) had applied for information

¹ 1 Esp. 226.

1 Saund. 181.

² 1 M. & S. 273.

⁵ 9 Ad. & E. 1.

³ 8 T. R. 293.

as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this court had to consider was, first, that the papers in question had been published by order of the House of Commons; secondly, that the House having resolved (as it had done with a view to such an action) that the power of publishing such of its reports, votes, and proceedings, as it should deem necessary, was an essential incident to the functions of parliament, the question became one of privilege, as to which the decision of the House was conclusive, and could not be questioned in a court of law.

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege, — doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the Legislature, — Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may

incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by Bayley, J., in *Bromage v. Prosser*, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. "The rule," says Lord Campbell, C. J., in the case of *Taylor v. Hawkins*,¹ "is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice."

It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*,² namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Daivson v. Dun-*

¹ 16 Q. B., at p. 821.

² 8 T. R. at p. 298.

can¹ Lord Campbell says: "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex v. Wright*,² that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the Legislature by which our laws are framed, and to whose charge the great interests of the country are committed, — where would be our attachment to the constitution under which we live, — if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the Legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be sup-

¹ 7 E. & B., at p. 231.

² 8 T. R., at p. 298.

pressed. But to this, in addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state, — no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honor is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

The learned counsel for the plaintiff scarcely ventured as of his own assertion to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from the publishing of the proceedings of courts of justice, but he relied on the *dicta* of Littledale, J., and Patteson, J., in *Stockdale v. Hansard*,¹ and on the opinions of certain noble and learned lords in the course of debates in the House of Lords on bills introduced by Lord Campbell for the purpose of amending the law of libel.² There is no doubt that in delivering their opinions in *Stockdale v. Hansard*,¹ the two learned judges referred to denied the necessity and in effect the public advantage of the proceedings in parliament being made

¹ 9 Ad. & E. 1.

² In 1843: see *Hansard's Parliamentary Debates*, 3d series, vol. lxx. pp. 1254-8; and in 1858, see vol. cxlix. pp. 947-82.

public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned judges, not satisfied with demonstrating, as they did, by conclusive arguments, that the House had not the power to order papers of a libellous character and forming no part of the proceedings of the House to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. Lord Denman, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of a Mansfield, while overthrowing by irresistible arguments the positions of the Attorney-General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the houses of parliament, not by denying the policy of giving power to the House to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything. That the Legislature did not concur with the two judges in their view of the policy is manifest from the Act of 3 Vict. c. 9, passed in consequence of the decision in *Stockdale v. Hansard*,¹ the preamble of which statute recites that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament and to the promotion of wise legislation that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either house of parliament as such house of parliament may deem fit or necessary to be published." After which the Act proceeds to provide for the prevention of actions being brought in respect of papers published by order of either house of parliament.

As regards the attempt of Lord Campbell to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment,² we think it may be as well accounted for by the apprehension, as to the result of any proceeding at law in which the legality of such publication should come in question, produced in his mind by the language of the judges in *Stockdale v. Hansard*,¹ as

¹ 9 Ad. & E. 1.

² See Hansard's Parliamentary Debates, 3d series, vol. lxx. p. 1254; and vol. cxlix. p. 947.

by any conviction of the defectiveness of the law. And as regards the opinions of the noble and learned persons in the debates in the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of parliamentary debates, if involving defamatory matter, was contrary to law, and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place. We, before whom this question is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the bar to assist us, must endeavor to ascertain the law as applicable to the case, and, if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of forensic discussion, or the opportunity of a judicial consideration of the subject. And this is the more necessary, as we observe that one of the main grounds insisted on for resisting Lord Campbell's bill was, that there was no necessity for legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate. We cannot but think that,—had the noble and learned persons referred to foreseen that such an action as the present would be brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the houses of parliament which he knew would, in the ordinary course of things, be reported, charges as a libel the publication of the discussion which he himself has provoked, and which publication he would have hailed with satisfaction if the result of it had been favorable to himself and damaging to the object of his attack,—they would have paused before they assumed that by law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective.

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injus-

tice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*,¹ and *Rex v. Creevey*.² At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*,³ as to such a speech being privi-

¹ 1 Esp. 226.

² 1 M. & S. 273.

³ 7 E. & B., at p. 233.

leged if *bona fide* published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country — which certainly never will be the case — any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

So much for the great question involved in this case. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the "Times" commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was

privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts, — in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of the alleged misdirection as also on the former point, the ruling at *nisi prius* was right, and that consequently this rule must be discharged. *Rule discharged.*¹

RYALLS v. LEADER AND OTHERS.

IN THE EXCHEQUER, MAY 26, 1866.

[Reported in *Law Reports*, 1 *Exchequer*, 296.]

DECLARATION on a libel published of the plaintiff by the defendants, in a newspaper called the "Sheffield and Rotherham Independent."

Plea. Not guilty. Issue thereon.

The libel complained of was contained in a report of an examination of a debtor in custody, held in York Castle, before the registrar of the Leeds Bankruptcy Court, pursuant to the provisions of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), ss. 101, 102; and it conveyed an imputation on the solvency of the plaintiff, who had been the debtor's partner. The cause was tried at the last Leeds spring assizes before Keating, J., when, the publication of the defamatory matter having been proved, the learned judge told the jury that "the libel was a privileged communication, and that the defendants were entitled to the verdict if the jury thought that the libel was a fair report of the proceedings before the registrar of the Court of Bankruptcy, and published without malice." The report contained no original comment on what passed. The jury found a verdict for the defendants.

In Easter Term last, a rule *nisi* was obtained for a new trial.²

¹ *Garby v. Bennett*, 57 N. Y. Sup. Ct. 853; *Buckstaff v. Hicks*, 94 Wis. 34. (*Semble* — report of proceedings of common council of a city not privileged.) *Dillon v. Balfour*, L. R. 20 Ir. 600 *Accord.* — Ed.

² The arguments of counsel and the concurring judgments of Martin and Channell, BB., are omitted. — Ed.

POLLOCK, C. B. I am of opinion that my Brother Keating was right in his ruling. The complaint here made is that certain proceedings held by a registrar in bankruptcy in York Castle, and published by the defendant, were libellous on the plaintiff. The defence is, that the alleged libel was contained in a fair, correct, and *bona fide* report of what took place; and if these proceedings were in a public court, and the publication was fair, there is no foundation for this action.¹ The only question then is, whether the registrar's court was under the circumstances a public court. I think that it was. We ought, in my opinion, to make as wide as possible the right of the public to know what takes place in any court of justice, and to protect a fair *bona fide* statement of proceedings there. The jury found that the publication of this report was *bona fide*, and the verdict, therefore, ought not to be set aside.

BRAMWELL, B. I am of the same opinion. I think that this court was a public court. That is shown from the terms of ss. 101 and 102. And even if it were not so, yet if the officer who holds it chooses to make it public, it would be public for this purpose. Then as to the point made, that nothing ought to be published affecting a third party, even when relevant to the inquiry, I think there is no such restriction. Those who are present hear all the evidence, relevant or irrelevant, and those who are absent, may, as far as I can see, have all that is said reported to them. The doctrine contended for is an entire novelty, because, if sound, every witness might bring an action against the newspaper publisher reporting his evidence, and call upon that publisher to prove all the libellous statements which might be contained in his examination or cross-examination. I do not think that there is any such qualification as that suggested, nor do I concur in the other suggestion made to us, viz., that what is *irrelevant* and libellous on a third person is not protected. There are cases where an individual must suffer for the public good, and it is difficult to draw the line between relevancy and irrelevancy. My opinion is, that when once you establish that a court is a public court, a fair *bona fide* report of all that passes there may be published. Possibly this privilege is applied to courts of

¹ Risk Allah Bey v. Whitehurst, 18 L. T. Rep. 615; Hope v. Leng, 23 T. L. R. 243; Furniss v. Cambridge News, 23 T. L. R. 705; Todd v. Every Evening Co., (Del. 1906) 62 Atl. R. 1089 (*semble*); Blodgett v. Des Moines Co., (Iowa, 1907) 113 N. W. R. 821; Billet v. Publishing Co., 107 La. 751 (*semble*); McBee v. Fulton, 47 Md. 403; Cowley v. Pulsifer, 137 Mass. 392; Conner v. Standard Co., 183 Mass. 474; Nixon v. Dispatch Co., 101 Minn. 309; Hawkins v. Globe Co., 10 Mo. Ap. 174; Boogher v. Knapp, 97 Mo. 122; Brown v. Knapp, 213 Mo. 655 (*semble*); Brown v. Globe Co., 213 Mo. 611; Thompson v. Powning, 15 Nev. 195; Edsall v. Brooks, 17 Abb. Pr. 221; N. Y. Code Civ. Proc., § 1907; Ackerman v. Jones, 37 N. Y. Sup'r Ct. 42; Salisbury v. Union Co., 45 Hun, 120; Hart v. Sun Co. 79 Hun, 358; Cincinnati v. Timberlake Co., 10 Ohio St. 548; Metcalf v. Times Co., 20 R. I. 674; Sanders v. Baxter, 6 Heisk. 369; Am. Co. v. Gamble, 115 Tenn. 663; People v. Glassman, 12 Utah, 238 *Accord*.

So publication of copies from the register of judgments is privileged. Searles v. Scarlett, '92, 2 Q. B. 56.

Publication of papers filed in the clerk's office, but not produced in open court, are not privileged. Cowley v. Pulsifer, 137 Mass. 392; Parke v. Detroit Co., 72 Mich. 560; Barber v. St. Louis Co., 3 Mo. Ap. 397; Stuart v. Press Co., 83 N. Y. Ap. Div. 467; American Co. v. Gamble, 115 Tenn. 663; Ilsley v. Sentinel Co., 133 Wis. 20. — Ed.

justice, because needless scandals are usually avoided in them. I am therefore of opinion that this rule should be discharged.

Rule discharged.

USILL v. HALES.

IN THE COMMON PLEAS DIVISION, JANUARY 30, 1878.

[Reported in 3 Common Pleas Division Reports, 319.]

LORD COLERIDGE, C. J.¹ I am of opinion that this rule must be discharged.

This was an action against the proprietor of a newspaper for publishing a *bona fide* and fair report of proceedings before a magistrate. Three persons, surveyors, who had been employed by a civil engineer to assist in the construction of a railway in Ireland, hearing that their employer had been paid, and conceiving that the money due to them had been improperly withheld by him, went before a police magistrate in London, and (I must take it for the purpose of my judgment, and do so take it) applied to him for a summons or order under the Masters and Workman's Act. In the result, the magistrate thought that the facts stated by the complainants showed no ground for a summons against the plaintiff under the Act; and therefore in the result it turned out that, in a certain sense, an application had been made to the magistrate with regard to a matter as to which he had no jurisdiction. I say in a certain sense: but it has been long held, and I think most properly held, that it is not the result but the nature of the application made to the magistrate which founds his jurisdiction; and that, wherever an application is made to a magistrate as to a matter over which, supposing the facts to bear out the statement, he has jurisdiction, he then has jurisdiction to ascertain whether the facts make out a case for the exercise of that jurisdiction which, if the facts make out the case, undoubtedly he has.

It has been laid down again and again in broad terms that the publication of the proceedings in courts of justice is privileged if the report of such proceedings be fair and honest; and this is so found to be. An attempt however has been made (and Mr. Shortt will allow me to say that, if it were possible to have succeeded, I think his argument would have succeeded, because he has said everything that could be said, and has said it well,) to distinguish this case and take it out of the general proposition, by bringing it within an undoubted qualification which has been grafted upon that general proposition, viz., that the application to the magistrate here was what may be called an *ex parte* or a preliminary proceeding. Now, there is no doubt that, in many cases to which Mr. Shortt has referred, the term "*ex parte* pro-

¹ Only the opinion of LORD COLERIDGE, and that, too, slightly abridged, is given. LOPES, J., concurred. — ED.

ceeding" has been over and over again used by judges of great eminence, sometimes affirmatively to say that an *ex parte* proceeding is not privileged, and sometimes negatively to say, this, being a proceeding not *ex parte*, is privileged; and I do not doubt for my own part that, if this argument had been addressed to a court some sixty or seventy years ago, it might have met with a different result from that which it is about to meet with to-day. Speaking frankly, — and it is useless, if a case has made a certain impression upon your mind after you have done the best you can to understand it, to say it has not made that impression, — it seems to me quite plain that in such cases as *Rex v. Fleet*¹ judgments of great judges do lay down the rule that an *ex parte* or preliminary proceeding is not privileged on the ground, good or bad, that it is very hard upon an individual to have a matter stated against him behind his back which he has no means of answering; and that oftentimes an accused person will come to trial, if he be tried, with a heavy weight of prejudice; where the case against him has been reported in the public newspapers, and his own answer, if he has one, from the necessities of the case has not been similarly made known. No doubt there are very strong observations in those cases adopted in *Duncan v. Thwaites*² which go very far to maintain that proposition. There is also a *dictum* of one of the greatest authorities in our law, Lord Eldon, than whom few greater lawyers have ever sat in Westminster Hall, who is reported, by Mr. Starkie,³ to have once observed that he recollected the time when it would have been matter of surprise to every lawyer in Westminster Hall to learn that the publication of *ex parte* proceedings was legal.

But we are not now living, so to say, within the shadow of those cases: and it is idle to deny that there are cases since that time, in which the decisions I have just now referred to have been brought to the attention of the learned judges, where the courts have been pressed with the authority of those decisions, and have come to conclusions which it is not for me to say are inconsistent, but which I am perfectly unable to reconcile with those earlier cases: and I find what I think is excellent good sense in the judgment of the Court of Queen's Bench in the case of *Wason v. Walter*, which explains how that is. It is a passage which one of the learned counsel read to us, and it is a passage which upon the whole I should desire to adopt and adhere to: "Whatever disadvantages attach to a system of unwritten law, — and of this we are fully sensible, — it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society and to the requirements and habits of the age in which we live, so as to avoid the inconveniences and injustice which arise where the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has in many respects only gradually developed itself into anything like satisfactory and settled form. The full liberty of public writers to

¹ 1 B. & A. 379.

² 3 B. & C. 556.

³ Starkie on Libel, 4th ed., p. 191 (9).

comment on the conduct and motives of public men has only in very recent times been recognized." And then the passage goes on, — "Even in quite recent days judges, in holding the publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what we call *ex parte* proceedings as a probable exception from the operation of the rule. Yet *ex parte* proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of; and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the honest publication, and innocent of all intention to do injury to the reputation of the party affected." Now, to the general line of argument in that passage, and to the accuracy of the statement in the last sentence I have read, I entirely adhere; and it is familiar that not only are unimportant cases and *ex parte* proceedings published, but a particular class of inquiries which in some of the earlier cases I find actually by name excluded from the privilege, — I mean inquiries before a coroner, — are in cases which may be supposed to interest the public reported in all the newspapers in the kingdom; and yet no one ever heard, at least since I have known Westminster Hall, of an action being brought by a person injuriously affected by such publication, where the report is honest and *bona fide*, and published without intention to injure. That, therefore, seems to introduce this element into the determination of these cases, that there is a certain elasticity in the rules which apply to questions of privilege (development is perhaps the more correct expression), and that the courts have from time to time applied as best they may what they think is the good sense of the rules which exist to cases which have not been positively decided to come within them. If there had been a case directly in point in which a proceeding such as this, where the matter was at an end, and where the publication had been found by the jury to have been *bona fide*, honest, and fair, had been held by a court of co-ordinate jurisdiction not to be privileged, I do not hesitate to say for my own part that I should have gladly acted upon it, because I do not disguise that my own judgment is not at all satisfied with the enormous advantage to the public of having every small personal matter reported day by day, often to the extreme pain and injury of individuals, which is supposed to form its justification. Nevertheless, I feel it to be the duty of a judge not to declare what he considers the law ought to be, but to decide according to what to the best of his judgment he finds it is: and, if he finds a principle laid down upon competent authority, it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it.

I come therefore to the consideration of this case feeling that the general tendency of the law has been to hold such a publication as this to be within the protection of the privilege. Now, I do find one case which to the best of my judgment appears to cover this case, and from which I am unable, according to the principle laid down in it, to distinguish the case now before us. It is a case to which much reference has been made, and which Mr. Shortt has dealt with at considerable length, viz. *Lewis v. Levy*;¹ and it has no doubt a most important bearing upon this question. I do not propose to read the elaborate judgment delivered by Lord Campbell in that case: it is well summed up in these words: "The rule, that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged, extends to proceedings taking place publicly before a magistrate on the preliminary investigation of a criminal charge terminating in the discharge by the magistrate of the party charged." I am perfectly aware that there may be subtle distinctions, — distinctions which I will not say are merely shadowy, but which are subtle, — between the facts of that case and those of the case now before us: but I cannot disguise from myself that the *ratio decidendi* and the argument by which the court was there led to hold such proceedings to be privileged, do in effect cover this case. I am of opinion that this is a case in which there was a judicial proceeding terminating, not in the discharge of the party accused, because there was no such person before the magistrate, but terminating in a refusal to proceed with the charge and to set the criminal process in motion. I am unable to distinguish the principle of *Lewis v. Levy*¹ from that involved in the present case; and I adopt what is said there² of the old, — and I may say great case, because it was decided by judges of high authority, — of *Curry v. Walter*,³ so far back as the year 1796. That case is adopted by the Court of Queen's Bench in a written judgment in the year 1858, as a ground of their decision; and, whatever may have been said about it in some of the intermediate cases, and the doubts that have been thrown upon it by some eminent judges, it must I think be considered to be completely rehabilitated by the judgment of the Court of Queen's Bench in *Lewis v. Levy*.¹ I am content, therefore, to rest my judgment in this case upon the principles laid down in *Curry v. Walter*³ and deliberately reaffirmed in *Lewis v. Levy*,¹ and to say that, upon the principles there laid down, I am of opinion that this rule must be discharged.

*Rule discharged.*⁴

¹ E. B. & E. 537.

² E. B. & E., at p. 559.

³ 1 B. & P. 525.

⁴ *Curry v. Walter*, 1 Esp. 456, 1 B. & P. 526; *Lewis v. Levy*, E. B. & E. 537; *Kimber v. Press Association*, '93, 1 Q. B. 65; *McBee v. Fulton*, 47 Md. 403; *Salisbury v. Union Co.*, 45 Hun, 190 (*semble*); *Metcalf v. Times Co.*, 20 R. I. 674 (*semble*); *Brown v. Providence Co.*, 25 R. I. 11 (*semble*) *Accord*.

See *Duncan v. Thwaites*, 3 B. & C. 556; *Todd v. Every Evening Co.*, Del. (1906) 62 Atl. R. 1089; *Cowley v. Pulsifer*, 137 Mass. 392; *Stanley v. Webb*, 4 Sandf. 21; *Matthews v. Beach*, 5 Sandf. 256; *Cincinnati Co. v. Timberlake*, 10 Ohio St. 548.

The report of *ex parte* proceedings may be published before their termination, if of such

MILISSICH v. LLOYD'S.

IN THE COURT OF APPEAL, FEBRUARY 9, 10, 1877.

[Reported in 13 Cox, Criminal Cases, 575.]

MELLISH, L. J.¹ In this case the defendants have appealed from a decision of the Common Pleas Division, ordering a new trial on the ground that the verdict given for the plaintiff was against the weight of evidence. They are not satisfied with that order, but they come before us to have judgment entered for themselves. The question for us is an important one, as to the power of the court to enter judgment under the Judicature Acts. Now, although the Judicature Acts do undoubtedly give very general powers to the court as to entering of judgment, it is clearly not intended by the Legislature that the court should take advantage of that general rule to remove questions from the consideration of the jury which are questions of fact properly for their consideration. The action was brought by the plaintiff against Lloyd's for an alleged libel published by Lloyd's in a pamphlet. At the trial, no doubt, the defence of privileged communication was raised and Lord Coleridge expressed an opinion that Lloyd's would not have the same privilege as an ordinary newspaper; and he also expressed an opinion that, inasmuch as only the speech of the prosecuting counsel and the summing up of the judge, and not the speech of the counsel for the defence, at the criminal trial, was published, the report could not be a fair one of the trial. I cannot agree with either of these doubts. I cannot think there is any difference between the privilege attaching to a report in a newspaper or in a pamphlet, unless some question of malice is raised. Of course, if actual malice is alleged, the fact that the libel was published in a pamphlet and not in a newspaper might be very material, but when no such allegation is made I cannot conceive there is any difference. I also cannot agree that the mere fact that the publisher did not publish the evidence in full, but only the summing up of the judge and the speech of the prosecuting counsel, made the report of the trial an unfair one. I think that proposition implies that proceedings at trials cannot be reported at all unless they are reported in full. It must, therefore, be sufficient to publish a fair abstract of the evidence. Now, I do not know how the reporter could do better than take the judge's summing up to get that fair abstract, although I do not, of course, lay down as a matter of law that the summing-up of a judge is necessarily a correct summary for the report. I think this report may be fair or it may be unfair; but then, is it a question of fact or law whether the report is fair or unfair? I think that it is a question of fact, and should be left to the jury to determine. Then the argument is that the evidence is all one way and that it is useless sending the case

a character that there will be a final decision. *Kimber v. Press Association*, '93, 1 Q. B. 65. — ED.

¹ Only the opinion of MELLISH, L. J., is given. — ED.

down to a new trial because no jury could reasonably find the other way. In my opinion, the court must be very cautious not to take upon itself the functions of a jury. Notwithstanding the great powers given by the Judicature Acts, it is still, of course, the province of the jury to determine between the credibility of witnesses on either side. Here, however, the question is more what is the inference to be drawn from the facts proved in evidence. The general inference to be drawn from all the facts, as in *Lewis v. Levy*,¹ is for the jury. There the whole proceedings before the magistrates were put in evidence, in order to judge of the fairness of the report. Here a full shorthand note is produced, and, being placed in the hands of the jury, they are to draw the inference, and not the court. Now, although I think that persons might draw very unfair inferences against a man who, like the plaintiff, did not appear at the trial himself and could not defend himself from the charges which were made against him on both sides, still, if the report is a fair one of what took place the defendants will be privileged. The question for the jury will be at the new trial—was the report a fair one, and would it give a fair notion to people who were not there of what took place? That question is one for the jury, and I think the case should, therefore, be sent for a new trial.

*Judgment below affirmed.*²

STEVENS v. SAMPSON.

IN THE COURT OF APPEAL, NOVEMBER 15, 1879.

[Reported in 5 *Exchequer Division Reports*, 53.]

CLAIM for falsely and maliciously printing and publishing of the plaintiff certain words in certain newspapers. The libel set out in the claim was a report, published by the defendant, of certain proceedings in a plaint of *Nettlefold v. Fulcher*, tried at the Marylebone county court, and brought to recover damages and costs sustained by *Nettlefold* in setting aside certain proceedings instituted by *Fulcher* against *Nettlefold* to recover the possession of certain premises. It alleged that at the county court the defendant in the present action appeared for *Nettlefold*, and made statements regarding the conduct of the plaintiff in the present action, who was a debt collector and employed by *Fulcher* as agent to recover possession of the premises.

Statement of defence: That the words alleged to have been published were a true and correct account and report of a certain trial in a court

¹ E. B. & B. 537.

² *Macdougall v. Knight*, 14 App. Cas. 194 (explaining a. c. 17 Q. B. Div. 636); *Salisbury v. Union Co.*, 45 Hun, 120 *Accord*.

See Annaly v. Trade Co., L. R. 26 Ir. 394. — Ed.

of justice having jurisdiction in that behalf, and of certain words spoken during the sitting of the court in the course of the trial, and published for the public benefit, and without malice. Issue thereon.

At the trial before Cockburn, C. J., at the Hilary Sittings, 1879, at Westminster, it was proved that the defendant, who was a solicitor, had sent the report set out in the claim of the trial of *Nettlefold v. Fulcher*, before the Judge of the Marylebone county court, to the local newspapers. Cockburn, C. J., left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury answered these questions: 1. That it was in substance a fair report; 2. That it was sent with a certain amount of malice; and found a verdict for the plaintiff with 40*s.* damages. Cockburn, C. J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong.

LORD COLERIDGE, C. J.¹ The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged, two elements must exist: not only must the occasion create the privilege, but the occasion must be made use of *bona fide* and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for *bona fides* is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding, are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension. *Judgment affirmed.*²

¹ The concurring opinions of BRAMWELL and BRETT, L. JJ., and the argument for defendant are omitted. — ED.

² *Salmon v. Isaac*, 20 L. T. Rep. 885; *Lawyers Co. v. West Co.*, 32 N. Y. Ap. Div. 585; *Saunders v. Baxter*, 6 Heisk. 369 *Accord.* — ED.

PURCELL v. SOWLER AND OTHERS.

IN THE COURT OF APPEAL, FEBRUARY 3, 1877.

[Reported in 2 Common Pleas Division Reports, 215.]

ACTION for libel.

The libel was contained in a report, published in a Manchester newspaper, by the defendants, the proprietors, of the proceedings at a meeting of the board of guardians for the Altrincham poor-law union, at which *ex parte* charges were made against the plaintiff, the medical officer of the union workhouse at Knutsford, of neglect in not attending the pauper patients when sent for.

At the trial it appeared that the charges were unfounded in fact, but it was admitted that the report was accurate and *bona fide*. A verdict was taken by consent for the plaintiff, with nominal damages and costs, judgment to be entered accordingly, with leave to move to enter judgment for the defendants, if the court should be of opinion that the publication was privileged.

The Common Pleas Division refused the motion, ordering judgment to stand for the plaintiff.¹

The libel, &c., are set out at length in the report in the court below.

The defendants appealed.

J. Edwards, Q. C., for the defendants.

C. Russell, Q. C., and *Bigham*, for the plaintiff.

MELLISH, L. J.² I am of the same opinion. We are asked to extend the law of privilege as to the report of proceedings of a public body to an extent beyond what it has as yet been carried. In Lord Campbell's time it was supposed that the privilege only extended to the proceedings in a court of law. A report of such proceedings has always been held privileged, because all her Majesty's subjects have a right to be present, and there would, therefore, be nothing wrong in putting the rest of the public in the position of those who were actually present. The privilege has been extended to the publication of debates in parliament, and properly extended, as they stand on the same principle as the proceedings in courts of law. There is no doubt this distinction: that as to courts of law the public have a right to be present, but they are only admitted to the debates in either House of Parliament when the House chooses to permit them to be present. The House has a discretion, but when the debates are held in public, it is clear that a newspaper ought not to be held to commit an offence by putting those who were not present in the same position as those who were. It is argued that this privilege ought to be extended as to a variety of other public bodies. I express no decided opinion, and I desire, with the

¹ 1 C. P. D. 781.

² The concurring opinions of COCKBURN, C. J., and BAGGALLAY and BRAMWELL, JJ. A., and the arguments of counsel are omitted. — ED.

Lord Chief Justice, to be understood as expressing no opinion ; but at the same time I am clearly of opinion that the privilege ought not to be extended to such a case as the present. A board of guardians have a discretion whether or not they will admit the public to their meetings ; and whether they choose to exclude or choose to admit, the public have no right to complain. But I cannot think that the courts of law are to be bound by the mode in which the guardians exercise their discretion in admitting or excluding strangers. Although they admit the public on an occasion when *ex parte* charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication ; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had an opportunity of meeting them ; and I cannot see any inconvenience in holding that the publication is not privileged ; in holding otherwise we should be depriving the individual of his rights without any commensurate advantage. The law on the subject of privilege is clearly defined by the authorities. Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges. If one of the guardians had met a person not a ratepayer or parishioner, and had told him the charge against the plaintiff, surely he would have been liable to an action of slander. I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained. If the neglect charged against the plaintiff had been proved, then fair comments on his conduct might have been justified. But that is a very different thing from publishing *ex parte* statements, which not only are not proved, but turn out to be unfounded in fact. I am, therefore, clearly of opinion that the occasion of the publication was not privileged, and that the judgment for the plaintiff ought to be affirmed.

*Judgment affirmed.*¹

¹ See *Charlton v. Watton*, 6 C. & P. 385 ; *Davison v. Duncan*, 7 E. & B. 229, 233 ; *Popham v. Pickburn*, 7 H. & N. 891 ; *Davis v. Duncan*, L. R. 9 C. P. 396 ; *Allbut v. General Council*, 23 Q. B. D. 400, 411.

By St. 51 & 52 Vict. c. 64, §§ 3 and 4, "§ 3. A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged : Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.

"§ 4. A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made

IRA BARROWS v. LUTHER V. BELL.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1856.

[Reported in 7 Gray, 301.]

SHAW, C. J.¹ The present is an action of tort, brought to recover damage for a publication alleged to be a libel upon the plaintiff, consisting of an article published in the Boston Medical and Surgical Journal, under the direction of the defendant.

The article alleged to be libellous is headed, "The suits against the Massachusetts Medical Society," and it proceeds to give a brief account of the proceedings of the medical society, which resulted in the expulsion of the plaintiff from his membership, for misconduct.

Whatever may be the rule as adopted and practised on in England, we think that a somewhat larger liberty may be claimed in this country and in this Commonwealth, both for the proceedings before all public bodies, and for the publication of those proceedings for the necessary information of the people. So many municipal, parochial and other public corporations, and so many large voluntary associations formed for almost every lawful purpose of benevolence, business or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of these public proceedings, and a just and proper publication of them, as far as it can be done consistently with private rights. This view of the law of libel in Massachusetts is recognized, and to some extent sanctioned, by the case of *Commonwealth v. Clapp*,² and many other cases.

The Massachusetts Medical Society were not a private association; they were a public corporation, chartered by one of the earliest Acts under the Constitution, which was amended and their powers confirmed by several subsequent Acts. Sts. 1781, c. 15; 1788, c. 49; 1802, c. 123; 1818, c. 113.

maliciously : Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter : Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same : Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit.

"For the purposes of this section 'public meeting' shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted." *Kelly v. O'Malley*, 6 T. L. R. 62, was decided under this statute. — ED.

¹ The case has been materially abridged. — ED.

² 4 Mass. 163.

The charter invested the society, their members and licentiates, with large powers and privileges, in regulating the important public interest of the practice of medicine and surgery, enabled them to prescribe a course of studies, to examine candidates in regard to their qualifications for practice, and give letters testimonial to those who might be found duly qualified. They were authorized to elect fellows, and vested with power to suspend, expel or disfranchise any fellow or member, and to make rules and by-laws for their government. No person could be a member, but by his own act in accepting the appointment.

This society was regarded by these legislative Acts as a public institution, by the action of which the public would be deeply affected in one of its important public interests, the health of the people. The plaintiff, by accepting his appointment as a fellow, voluntarily submitted himself to the government and jurisdiction of the society in his professional relations, so long as they acted within the scope of their authority.

The *status* or condition of being a member of this society was one of a permanent character and recognized by law — one in which each member has a valuable interest; and that it was so regarded by the plaintiff is manifest from his effort to obtain a restoration to it by a judgment of this court, by a writ of mandamus.

We think it obvious that the subject-matter of the complaint — dishonorable conduct, a fraudulent transaction between the plaintiff and another member of the profession and of the same society — was within the scope of the authority conferred by law on the society; and that the direction of the court, that their action was conclusive upon the plaintiff, was correct. As to the legal proceedings set forth in the supposed libel, it was admitted by the plaintiff's counsel that the account there given of those proceedings was substantially true.

If then this charge of dishonorable or fraudulent conduct by the plaintiff, in his dealings with Dr. Carpenter, was within the jurisdiction of the medical society, and proceedings were instituted and carried on to their final determination in the expulsion of the plaintiff from his fellowship, then the proceedings might be rightly characterized, as in the case of *Farnsworth v. Storrs*, as *quasi* judicial; and then the only remaining question of fact was, whether the publication was a true and correct narrative of such proceedings and determination. This question the judge did leave, or proposed to leave, to the jury; with the direction, that if they should find upon the evidence that that part of the publication was true, the defendant would be entitled to a verdict. We are of opinion that this direction was right. As the verdict was for the defendant, we are to assume that it was found by them; or, if the verdict was taken by consent, it would have been found under the instruction that the publication did present a true and correct narrative of the proceedings before the society, and their determination thereon.

The fact, that these proceedings were considered closed and finished, takes away from this publication the objection, that it would have a ten-

endency to prejudice the public mind and prevent the party affected from having a fair trial. *Judgment on the verdict for the defendant.*¹

BARNES v. CAMPBELL AND ANOTHER.

IN THE SUPREME COURT, NEW HAMPSHIRE, JUNE, 1879.

[Reported in 59 New Hampshire Reports, 128.]

CASE, for libel in accusing the plaintiff of crime. Plea, the general issue, with a brief statement alleging that the defendants are conductors and publishers of a newspaper published at, &c., and as such it was part of their duty to give to their readers such items of news as they might properly judge to be of interest and value to the community; and that, as such conductors and publishers, they published the article complained of, in good faith, without malice, believing and having good reason to believe the same to be true.

Motion by the plaintiff to reject the brief statement.

Suloway and *Topliff*, for the plaintiff.

C. R. Morrison and *Osgood*, for the defendants.

SMITH, J. Matter in justification must be pleaded. But according to some decisions, matter in excuse may be given in evidence under the general issue, or be pleaded. *State v. Burnham*,² and authorities cited; *Carpenter v. Bailey*.³ In this view of the case, it is, perhaps, immaterial whether or not the brief statement is defective. But, treating the brief statement and the motion to reject it as intended to raise the question whether the brief statement sets forth a defence, we are of opinion that it does not. The defendants probably intended to set out the excuse of a lawful occasion, good faith, proper purpose, and belief and probable cause to believe that the publication was true. They laid stress upon their business of publishing a newspaper. But professional publishers of news are not exempt, as a privileged class, from the consequences of damage done by their false news. Their communications are not privileged merely because made in a public journal. They have the same right to give information that others have, and no more. *Smart v. Blanchard*,⁴ *Palmer v. Concord*,⁵ *Sheckell v. Jackson*.⁶ The occasion of the defendants' publishing a false charge of crime against the plaintiff was not lawful, if the end to be attained was not to give useful information to the community of a fact of which the community had a right to be and ought to be informed, in order that they might act upon such information. *State v. Burnham*,⁷ *Palmer v.*

¹ Allbutt v. General Council, 23 Q. B. Div. 400 *Accord*.

² 9 N. H. 34, 43.

³ 53 N. H. 590.

⁴ 42 N. H. 137, 151.

⁵ 48 N. H. 211, 216.

⁶ 10 Cush. 25.

⁷ 9 N. H. 34, 41, 42.

Concord,¹ *Carpenter v. Bailey*.² The defendants do not state facts that would constitute a lawful occasion. They make a loose averment of their general duty to give their readers such news as they (the defendants) might properly judge to be of interest and value to the community. This should be struck out of the record as insufficient and misleading. It is, in effect, an intimation that they published the libel in the usual course of their business, and is calculated to give the jury the erroneous impression that the defendants' judgment of the propriety of the publication is evidence of the lawfulness of the occasion. The defendants' general business of publishing interesting and valuable news was not, of itself, a lawful occasion for publishing this particular, false, and criminal charge against the plaintiff. It will be for the jury to say what weight the defendants' business has as evidence on the question of malice. But however high the defendants' vocation, and however interesting and valuable the truth which they undertake to give their readers, their ordinary and habitual calling is no excuse for assailing the plaintiff's character with this false charge of crime. They must show specific facts constituting a lawful occasion in this particular instance, as if this false charge had been the only thing they ever published. They allege nothing of that kind. They do not state that the community had any interest which would have been protected or promoted by the publication complained of if it had been true, or had a right to be or ought to be informed of the subject-matter of it in order that they might act upon correct information of it, or that the information given would have been practically useful to anybody if it had been true. This is the substance of a lawful occasion. The brief statement contains no specification on this point.

Motion granted.

¹ 48 N. H. 211, 217.

² 53 N. H. 590; a. c. 56 N. H. 283.

SECTION VII. (*continued.*)

(b) COMMUNICATIONS IN THE COMMON INTEREST OF THE MAKER AND RECEIVER,
OR IN THE INTEREST OF THE MAKER ALONE.

BLACKHAM v. PUGH.

IN THE COMMON PLEAS, JANUARY 31, 1836.

[*Reported in 2 Common Bench Reports, 611.*]

TINDAL, C. J.¹ This was an action upon the case for a libel upon the plaintiff in the way of his trade.

The declaration stated that the plaintiff had sold his stock in trade by auction, and that the proceeds were then in the hands of his auctioneers; and that he, the plaintiff, had purchased of the defendant certain goods to the amount of £62 and upwards, upon a credit which had not then expired; and that the defendant falsely and maliciously published the libel complained of, in the form of a notice, which he procured his attorneys to send to his said auctioneers; by which notice they were desired not to part with the proceeds of the sale in their hands, *the plaintiff having committed an act of bankruptcy.*

Upon the general issue, the jury returned a verdict for the plaintiff, by the direction of the learned judge, who told the jury this was not a case in which the defendant was justified under the general issue, although he made the communication *bona fide*, and believing it to be true at the time. And whether this direction of the learned judge was right or not, is the question raised for our consideration, on a motion for a new trial.

This action, it is to be observed, is not an action against the defendant for maliciously, and without any reasonable or probable cause, directing his attorneys to give the notice to the auctioneers; under which form of action, the defendant would have been held liable in damages to the plaintiff, if, without any reasonable cause, but from over-precipitation, or unfounded suspicion, he had caused such notice to be given. But this is an action for a false and malicious *libel*. And the question is, whether such action is maintainable where there is altogether the absence of any malice in fact, and where the defendant, having a personal interest in preventing the money from being paid over to the plaintiff, did, with perfect good faith, and in the full belief that the plaintiff had committed an act of bankruptcy, direct his attorneys to give such notice to the auctioneers.

If the defendant had issued a fiat in bankruptcy against the plaintiff,

¹ Only the opinion of the Chief Justice is given. COLTMAN and ERLE, JJ., concurred. CRESSWELL, J., dissented. — ED.

in pursuance of his notice,¹ it is perfectly clear that the plaintiff could not have sued him in an action of slander or for a libel, but must have brought his action for maliciously, and without any reasonable or probable cause, issuing the fiat. And it does seem singular that a previous notice,² which was absolutely necessary to protect the interest of the creditors of the plaintiff under such fiat, should be supposed to fall under a different construction of law from the issuing of the fiat itself. It does, indeed, seem to be part and parcel of the same transaction.³

But, in any point of view, this case appears to me to fall within the range of that principle by which a communication made, by a person immediately concerned in interest, in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true, and without any malicious motive, is held to be excused from responsibility in an action for a libel. *Delaney v. Jones*, *M'Dougall v. Claridge*,⁴ and *Toogood v. Spryng*, appear to me to be authorities which fully support this proposition. In the last of these cases, the judgment includes — under those cases in which the law considers the occasion to prevent the inference of malice which it draws from unauthorized communications injurious to the character of another, — such communications as are fairly and honestly made “by a person in the conduct of his own affairs, in matters where his interest is concerned.”

It appears to me that the present case falls strictly within the principle so laid down, in the soundness and propriety of which principle I entirely agree; and, consequently, that the direction of the learned judge was incorrect, and that the rule should be made absolute.⁵

¹ The notice under the statute.

² The alleged libel.

³ *Secus*, where no fiat.

⁴ 1 Camp: 267.

⁵ *Delaney v. Jones*, 4 Esp. 191 (but see *Lay v. Lawson*, 4 A. & E. 798); *Fairman v. Ives*, 5 B. & Al. 642; *Coward v. Wellington*, 7 C. & P. 531; *Tuson v. Evans*, 12 A. & E. 733 (*semble*); *Wenman v. Ash*, 13 C. B. 836 (*semble*, communication to unsuitable person); *Manby v. Witt*, 13 C. B. 544; *Taylor v. Hawkins*, 16 Q. B. 308; *Amann v. Damm*, 8 C. B. N. S. 597; *Force v. Warren*, 15 C. B. N. S. 806; *Oddy v. Paulet*, 4 F. & F. 1009 (*semble*); *Cooke v. Wildes*, 5 E. & B. 328; *Regina v. Perry*, 15 Cox C. C. 169; *Bank v. Strong*, 1 App. Cas. 307; *Hunt v. Great Co.*, '91, 2 Q. B. 189; *Baker v. Carrick* [1894], 1 Q. B. 838; *Hobbs v. Bryers*, L. R. 2 Ir. 496; *Lang v. Gilbert*, 4 All. (N. B.) 445; *Gasley v. Moss*, 9 Ala. 266; *Butterworth v. Conrow* (Del. 1895), 41 Atl. R. 85; *Henry v. Moberly* (Ind. Ap. 1898), 51 N. E. R. 497; *Nichols v. Eaton*, 110 Iowa, 509; *Caldwell v. Story*, 107 Ky. 10; *Baysett v. Hire*, 49 La. An. 904; *Dickinson v. Hathaway* (La. 1909), 48 So. R. 136; *Beeler v. Jackson*, 64 Md. 589; *Brow v. Hathaway*, 13 All. 239; *Bacon v. Mich. Co.*, 66 Mich. 166; *Howard v. Dickie*, 120 Mich. 238; *Ala. Co. v. Brooke*, 69 Miss. 168; *Lovell Co. v. Houghton*, 116 N. Y. 520; *Lent v. Underhill*, 54 N. Y. Ap. Div. 609; *Reynolds v. Plumbers' Ass'n*, 63 N. Y. Sup. 303; *Behee v. Mo. Co.*, 71 Tex. 424; *Mo. Co. v. Richmond*, 73 Tex. 568; *Mo. Co. v. Behee* (Tex. 1893), 21 S. W. R. 384; *Miller v. Armstrong*, 24 N. Zeal. 968 *Accord.* — *Ed.*

LAWLESS v. THE ANGLO-EGYPTIAN COTTON CO.

IN THE QUEEN'S BENCH, FEBRUARY 11, 1869.

[Reported in *Law Reports*, 4 *Queen's Bench*, 262.]

LIBEL. The declaration charged that the defendants falsely and maliciously published of the plaintiff, their manager, in a certain report of the affairs of the company, these words: "The shareholders will observe that there is a charge of £1,306 1s. 7d. for deficiency of stock, which the manager is responsible for; his accounts as such manager in the company have been badly kept, and have been rendered to us very irregularly."

Plea: Not guilty. Issue thereon.¹

It was objected on behalf of the defendants that there was no evidence of a publication of the libel, and that it was a privileged communication. The Chief Baron overruled the objections, but reserved leave to the defendants to move to enter a nonsuit on both points. The plaintiff having proved his special damage, the jury found a verdict for £500.

A rule having been obtained to enter a nonsuit pursuant to the leave reserved,

Holker, Q. C., and *Gorst*, showed cause.

Manisty, Q. C. (*E. C. Fisher* with him), in support of the rule.

MELLOR, J. I am of opinion that the rule should be made absolute to enter a nonsuit. Had I been able to perceive that any substantial injustice might have been done by not leaving any question to the jury, I should have been disposed to send the case down for a new trial. But I think there was no evidence of express malice which ought to have been left to the jury.

As I understand the facts of the case, the plaintiff was employed as the agent of the defendants in Egypt, and his transactions were necessarily brought under the notice of the auditors, who are appointed by Act of Parliament, or at all events by the articles of association of the company, and who are fit persons to investigate the accounts of the company. The auditors considered that a deficiency in the stock of the company was owing in some sense to the plaintiff's default, and they expressed that opinion in their report. It seems they did this after having received such explanations as Mr. Bell could offer, but it must be observed that those explanations were offered to the auditors and not to the directors. What the directors did was this, in their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors. There is nothing whatever to

¹ The statement has been condensed, the facts sufficiently appearing in the opinion of **MELLOR, J.** The arguments of counsel and the concurring opinion of **HANNEN, J.**, are omitted. — Ed.

show that the directors had any reason to doubt the truth of that statement, and there was no evidence of any act on their part from which malice could be inferred, and therefore I think the Chief Baron was right in not putting the question of malice to the jury. As to the question of intrinsic or extrinsic evidence, the report was one which the directors were fully warranted in believing was correct; and there is nothing to show that the directors acted otherwise than *bona fide* in communicating it to the shareholders. No doubt the directors are to make their report to a meeting of the shareholders, to be called for that purpose, and it is clear that those who are absent are bound by the acts of those who are present, but the absent shareholders are interested in the prosperity or adversity of the company, and in knowing all the circumstances upon which the welfare of the company depends. It seems to me, therefore, that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous.

This case does not fall within the rule in *Cooke v. Wildes*.¹ There the question of malice was properly left to the jury, because the letter contained defamatory expressions which were unnecessary; the defendant was not content with stating the facts that he had heard, but he made a calumnious observation of his own and put a gloss on the plaintiff's conduct which was libellous. There was therefore intrinsic evidence of malice, and that the defendant had not acted *bona fide*, and these questions were properly left to the jury. I think we are bound by the cases of *Somerville v. Hawkins* and *Taylor v. Hawkins*.² The principle there laid down is, that where there is no evidence of malice the judge ought not to leave any question to the jury. Here I think the conduct of the directors negatives malice on their part, and it is clear that they acted *bona fide*. I think we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged. I also think that it was the duty of the directors to communicate the report not only to the shareholders present at the meeting, but to all the shareholders, and that they had an interest in receiving it. I am glad that Mr. Holker called our attention to the American authority, for it supports the judgment of the court. In *Philadelphia, Wilmington, and Baltimore Railroad Company v. Quigley*³ it was held that it was within the course of business and employment of the president and directors for them to investigate the conduct of their officers and agents, and to report the result to the stockholders. It was also held, in the absence of malice and bad faith, that the report to the shareholders was privileged; therefore, to this extent, that case appears to me to be an express authority. But, independ-

¹ 5 E. & B. 328; 24 L. J. Q. B. 367.

² 16 Q. B. 308; 20 L. J. Q. B. 313.

³ 21 Howard (Rep. Sup. Court, U. S.), 202.

ently of any authority, I am quite prepared to hold that a company, having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders, whether present or absent, if the communication be made without malice and *bona fide*. The communication in this case is *prima facie* privileged, and there being no evidence intrinsic or extrinsic of malice, that question was very properly not left to the jury. I think the conclusion at which the Chief Baron arrived at *nisi prius* without hearing any argument erroneous, and with great deference to that eminent and learned judge, I am of opinion this rule to enter a nonsuit should be made absolute.

*Rule absolute.*¹

HANNAH WILSON PADMORE v. LAWRENCE.

IN THE QUEEN'S BENCH, JANUARY 18, 1840.

[Reported in 11 *Adolphus & Ellis*, 380.]

CASE for slander. The words charged to have been spoken by the defendant imputed that the plaintiff had stolen a brooch belonging to the defendant's wife; and they were said to have been uttered in a discourse, &c., and in the hearing of one Jane Cole and divers &c.

Pleas. 1. Not guilty. 2. A traverse of part of the inducement not material here.

¹ Barbaud v. Hookham, 5 Esp. 109; McDougall v. Claridge, 1 Camp. 267; Dunman v. Bigg, 1 Camp. 269 n.; Todd v. Hawkins, 2 M. & R. 20, 8 C. & P. 88; Shipley v. Todhunter, 7 C. & P. 680; Harris v. Thompson, 13 C. B. 333; Maitland v. Bramwell, 3 F. & F. 623; Scarll v. Dixon, 4 F. & F. 250; Cooke v. Wildes, 5 E. & B. 328; Croft v. Stevens, 7 H. & N. 570; Whitely v. Adams, 15 C. B. N. S. 392; Spill v. Maule, L. R. 4 Ex. 232; Laughton v. Bishop, L. R. 4 P. C. 495; Davies v. Sneed, L. R. 5 Q. B. 608; Waller v. Lock, 7 Q. B. D. 619; Cowles v. Potts, 34 L. J. Q. B. 247; Quartz Co. v. Beall, 20 Ch. Div. 501; Royal Aquarium v. Parkinson, '92, 1 Q. B. 431; Pittard v. Oliver, '92, 1 Q. B. 474; Phila. Co. v. Quigley, 21 How. 202; Broughton v. McGraw, 39 F. R. 672; Haight v. Cornell, 15 Conn. 74; Etchison v. Pergerson, (Ga. 1892) 15 S. E. R. 680; Wharton v. Wright, 30 Ill. Ap. 343; Coombs v. Rose, 8 Blackf. 155; Kirkpatrick v. Eagle Lodge, 26 Kana. 384; Lynch v. Febiger, 39 La. An. 336; Remington v. Congdon, 2 Pick. 310; Bradley v. Heath, 12 Pick. 163; Farnsworth v. Storrs, 5 Cush. 412; York v. Pease, 2 Gray, 282; Gassett v. Gilbert, 6 Gray, 94; Shurtleff v. Parker, 130 Mass. 293 (*semble*); Howland v. Flood, 160 Mass. 509; Landis v. Campbell, 79 Mo. 439; Rothholz v. Dunkle, 53 N. J. 438; Jarvis v. Hathaway, 3 Johns. 130; O'Donoghue v. McGovern, 23 Wend. 28; Streety v. Wood, 15 Barb. 105; Fowles v. Bowen, 30 N. Y. 30; Klinck v. Colby, 46 N. Y. 437; McKnight v. Haabrouck, 17 R. I. 70; Tillinghast v. McLeod, 17 R. I. 308; Holt v. Parsons, 23 Tex. 9; Shurtleff v. Stevens, 51 Vt. 501 (*semble*) Accord.

See also Dickeson v. Hilliard, L. R. 9 Ex. 79; Lyman v. Gowing, L. R. 6 Ir. 259, where the communication was made to unsuitable persons. — Ed.

On the trial before Parke, B., at the Hampshire summer assizes, 1838, it appeared that the plaintiff had called at the defendant's house, and that soon afterwards the brooch was missed; that defendant then went to an inn, where the plaintiff was, and stated to her his suspicions, in the presence of a third person; and that the plaintiff, with her own concurrence, was afterwards searched by Jane Cole and another female, who were called in for the purpose, and to whom the defendant at the time repeated the charge. The brooch was not found on the plaintiff, but was afterwards discovered to have been left by the defendant's wife at another place. The defendant's counsel first applied for a non-suit, which the learned judge refused. The defendant's counsel then, in his address to the jury, contended that the words were spoken without malice, under circumstances which privileged them. The learned judge told the jury that the verdict must be for the plaintiff, if they thought that the words imputed felony, for that it was clear they were not privileged. Verdict for the plaintiff.

In Michaelmas term, 1838, Erle obtained a rule for a new trial, on the ground of misdirection.

Crowder and Butt now showed cause.

Erle and Barstow, contra.¹

LORD DENMAN, C. J. The question ought to have gone to the jury, whether this charge was made *bona fide*. Unless *Toogood v. Spyring* is to be overruled, it is clear that the judge was not warranted in withdrawing that question from their consideration.

LITTLEDALE, J. The jury were to say whether the defendant believed that the brooch was stolen by the plaintiff, and for that reason charged her with having stolen it, and whether his language was stronger than necessary, or whether the charge was made before more persons than was necessary. The law has been laid down so over and over again.

COLERIDGE, J. For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime. Then had not the defendant a right to make out that case? The facts were for the jury. It is argued that the charge ought to be true, or ought to be made only before an officer of justice. But the exigencies of society could never permit such a restriction. If I stop a party suspected, must not I say why I do so? Supposing it unjustifiable to search a person against his will, here the plaintiff agreed to be searched. The presence of other parties would not do away with the privilege. When the two females were desired to make the search, were they not to be told for what they were to look? The question was clearly for the jury.

*Rule absolute.*²

¹ The arguments of counsel are omitted. — ED.

² *Johnson v. Evans*, 3 Esp. 32; *Fowler v. Homer*, 3 Camp. 294; *Jones v. Thomas*, 34 W. R. 104; *Lightbody v. Gordon*, 9 Scotch Sess. Cas. (4th series) 934; *Dale v. Harris*, 109 Mass. 193 *Accord*.

See to the same effect *Cristman v. Cristman*, 36 Ill. App. 567; *Harper v. Harper*,

THOMAS SUNDERLAND HARRISON v. EDWIN BUSH.

IN THE QUEEN'S BENCH, TRINITY TERM, 1855.

[Reported in 5 *Ellis & Blackburn*, 344.]

LORD CAMPBELL, C. J., in this term (May 24th), delivered the judgment of the court.¹

This was an action for a libel, tried before my Brother Crowder at the last Salisbury assizes. The defendant pleaded not guilty, and a justification.

It appeared that Dr. Harrison, the plaintiff, before and at the time when the cause of action accrued, was a justice of peace for the county of Somerset, and was in the habit of acting at petty sessions held in the borough of Frome. In the month of October last, there was a contested election, for a member to represent this borough in Parliament. During the election, there was much excitement; many windows were broken by the mob; and there were dangerous riots in the streets. The defendant was an elector and an inhabitant of the borough; and, after the election was over, he and several hundred other inhabitants of the borough prepared, signed and transmitted to Viscount Palmerston a memorial complaining of the conduct of the plaintiff as a magistrate during the election, imputing to him that he had made speeches directly inciting to a breach of the peace; that, after reading the Riot Act, he had sent a man into the streets armed with a bludgeon, and ordered him to strike any person he might meet, indiscriminately; and that he had himself violently struck and kicked several men and women. The memorial alleged that the plaintiff ought not to be allowed to remain in her Majesty's commission of the peace, and concluded thus: "Your memorialists therefore earnestly pray that your Lordship will cause such an inquiry to be made into the conduct of the said Dr. Harrison as your Lordship may think fit; and that, on the allegations contained in the memorial being duly substantiated and verified, your Lordship will feel it to be your duty to recommend to her Majesty that the said Dr. Harrison be removed from the commission of the peace."

The memorial being produced, and evidence given that it was signed by the defendant and transmitted by him to the office of the Secretary of State, the plaintiff appeared as a witness for himself, and denied the truth of the criminatory allegations in the memorial. He was followed by other witnesses to the same effect. At the close of the plaintiff's case, the defendant's counsel applied for a nonsuit, which the learned

10 Bush, 447; *Carnes v. Whitaker*, 123 Mass. 342; *Lally v. Emery*, 59 Hun, 237. Compare *Hooper v. Truscott*, 2 B. N. C. 457; *Harrison v. Fraser*, 29 W. R. 652. — Ed.

¹ Only the opinion of the court is given. — Ed.

judge (we think very properly) refused to direct. Assuming that the occasion of presenting the memorial *prima facie* repelled the inference of malice arising from criminatory matter which the memorial contained, that this comes within the category of privileged communications, and that, in the absence of all evidence to prove express malice, the judge would have been justified in directing a nonsuit, evidence had been given that, to the knowledge of the defendant, allegations contained in the memorial were false. Here was evidence of express malice; and a question of fact had arisen for the decision of the jury, whether the defendant in presenting the memorial had acted *bona fide* or maliciously.

The trial proceeded; and a great number of witnesses were called for the double purpose of proving the justification, or at all events of satisfying the jury that the defendant had acted *bona fide*. Some part of the libel was left uncovered by the justification.

The learned judge said that, on the authority of *Blagg v. Sturt*,¹ he should rule that the memorial to the Secretary of State was not a privileged communication, but would reserve leave to the defendant to move to enter a verdict for him, if the jury found *bona fides*. On this point, he desired them to consider "whether the memorial was got up and signed by defendant honestly for the purpose which is stated in it, or whether the defendant had any by-motive? If they found *bona fides* or not, they would assess damages; but these would vary as they thought defendant was actuated more or less by any malicious feeling. If he acted altogether *bona fide*, damages would be very considerably modified." The jury found a verdict for the plaintiff, damages 20s., saying: "We consider it a *bona fide* memorial."

A rule has been obtained to enter a verdict for the defendant; and this, we think, ought to be made absolute.

During the argument, a legal canon was propounded for our guidance by the plaintiff's counsel; and this we are willing to adopt, as we think that it is supported by the principles and authorities upon which the doctrine of privileged communications rests. "A communication made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." In the present case, little need be said to show that the communicator had both an *interest* and a *duty* in the subject-matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered instead of protecting life and property within the borough. They have an *interest* that they may not longer remain subject

¹ 10 Q. B. 899.

to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offence; and it was the *duty* of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished. "Duty," in the proposed canon, cannot be confined to legal duties which may be enforced by indictment action, or mandamus, but must include moral and social duties of imperfect obligation. One mode of proceeding for this offence would have been by applying to us for a criminal information, and seeking to have the offender punished by fine and imprisonment. But another, which, though milder, may be more effectual, is to try by lawful and constitutional means to have the offender removed from his office, without calling down upon him the sentence of a criminal court. In this land of law and liberty, all who are aggrieved may seek redress; and the alleged misconduct of any who are clothed with public authority may be brought to the notice of those who have the power and the duty to inquire into it, and to take steps which may prevent the repetition of it.

But it was hardly contended that this memorial would not have been a privileged communication if it had been addressed to a public functionary possessing the direct power of removing a magistrate from the commission of the peace. The great stress of the argument for the plaintiff has been, that the defendant and his co-memorialists mistook their course; that they ought to have addressed the memorial to the Keeper of the Great Seal; and that, by addressing it, although with good faith and according to the advice they received from the Under-secretary of State, to Lord Palmerston, who could not *proprio vigore* dismiss a magistrate from the commission of the peace, they are liable to this action, and might be convicted as libellers.

We think that we are not called upon at present to decide how far an honest mistake in seeking redress subjects a person to civil or criminal responsibility: and we give no opinion on the question whether action or indictment could be maintained against individuals living under the jurisdiction of a county court judge in the county palatine of Lancaster, who should *bona fide* present a criminatory memorial against him to the Lord High Chancellor, praying for his removal, instead of presenting it to the Chancellor of the Duchy of Lancaster, in whom, and in whom alone, the power of removing him is vested;¹ or how it would be if a gentleman, asked by letter for the character of a servant, should *bona fide* write an answer stating acts of dishonesty and immorality committed by the servant, and by mistake address it to another person different from the inquirer, although of the same name.

After great deliberation which we have bestowed upon the subject out of respect for the authority of *Blagg v. Sturt*,² we are of opinion that the defendant fell into no mistake whatever in the course which he adopted,

¹ Stat. 9 & 10 Vict. c. 95, c. 18. See *Ex parte Ramshay*, 18 Q. B. 173.

² 10 Q. B. 899.

and that, although he might have addressed the memorial to the Lord Chancellor, in which case it certainly would have been privileged, it is equally privileged being addressed to the Secretary of State.¹

*Rule absolute.*²

PROCTOR v. WEBSTER.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 21, 1885.

[*Reported in Law Reports, 16 Queen's Bench Division, 112.*]

MOTION to enter judgment for the defendant on the ground that the libel for which the action was brought was published on a privileged occasion.

At the trial before Denman, J., at the Nottingham Winter Assizes, 1885, it appeared that the plaintiff was sanitary inspector of the borough of Newark under the Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74, s. 42, and the libel was contained in a letter written by the defendant and addressed to "The Lords of Her Majesty's Most Honorable Privy Council." This letter charged the plaintiff with irregularities in the exercise of his office, and with taking a bribe from the owner of sheep which had been condemned as diseased.

It was objected that the occasion upon which the libel was published made it absolutely privileged, but the learned judge admitted evidence of express malice and left the case to the jury, who found a verdict for the plaintiff, damages £350.

J. H. Etherington Smith, for the defendant.*

POLLOCK, B. I am of opinion that there was no misdirection. The question of law which has been raised is one of some interest, now that

¹ The rest of the opinion, relating to the nature of the office of Secretary of State, is omitted. — Ed.

² *Blake v. Pilfold*, 1 M. & Rob. 195; *Woodward v. Lander*, 6 C. & P. 248; *James v. Boston*, 2 C. & K. 4; *Spackman v. Gibney*, Odgers, Lib. & Sl. (2d ed.) 226; *Beatson v. Skene*, 5 H. & N. 838; *Hart v. Von Gumpach*, L. R. 4 P. C. 439; *Stanton v. Andrews*, 5 Up. Can. Q. B. O. S. 211; *Corbett v. Jackson*, 1 Up. Can. Q. B. 128; *Rogers v. Spalding*, 1 Up. Can. Q. B. 258; *McIntyre v. McBean*, 13 Up. Can. Q. B. 534; *Bell v. Parke*, 10 Ir. C. L. R. 279 (*semble*); *White v. Nichols*, 3 How. 266; *Vogel v. Gruaz*, 110 U. S. 311; *Pearce v. Brower*, 72 Ga. 243; *Young v. Richardson*, 4 Ill. Ap. 364; *Rainbow v. Benson*, 71 Iowa, 301; *Rabb v. Trevelyan* (La. 1908), 47 So. R. 455; *Bodwell v. Osgood*, 3 Pick. 379; *Wieman v. Mabey*, 45 Mich. 484; *Greenwood v. Cobbe*, 36 Neb. 449; *State v. Burnham*, 9 N. H. 34; *Thorn v. Blanchard*, 5 Johns. 508; *Vanderzee v. McGregor*, 12 Wend. 545; *Howard v. Thompson*, 21 Wend. 319; *Halstead v. Nelson*, 24 Wend. 395; *Decker v. Gaylord*, 35 Hun, 584; *Woods v. Wiman*, 122 N. Y. 445, 47 Hun, 382; *Cook v. Hill*, 3 Sandf. 341; *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Harwood v. Keech*, 6 Th. & C. 665; *Logan v. Hodges*, 146 N. Ca. 38; *Gray v. Pentland*, 2 S. & R. 23; *Kent v. Bongarts*, 15 R. I. 72; *Reid v. Delorme*, 2 Brev. 76; *Harris v. Huntington*, 2 Tyler, 129 *Accord*. — Ed.

* The argument for the defendant is omitted. — Ed.

so many public officers are liable to be removed by the Privy Council under the powers which that important body possesses, not only by the common law, but by numerous Acts of Parliament. The Privy Council might no doubt have directed an inquiry into the conduct of the defendant, an inquiry which would have been in the nature of a judicial proceeding, and it is argued that a complaint made to them is absolutely privileged even when there is proof of express malice, in the same manner as a statement made during proceedings in one of the regular Courts of Justice. It is unnecessary to inquire into the nature of the functions which the Privy Council exercise under 41 & 42 Vict. c. 74, s. 42, and how far their powers under this Act differ from those of the ordinary constitutional body, for it cannot be pretended that on the present occasion they were exercising judicial functions.

In *Lake v. King*¹ the libel was addressed to a committee appointed by the House of Commons to hold an inquiry and take evidence, and this committee exercised judicial duties in the same manner as the ordinary parliamentary committees. In *Hare and Meller's Case*² the proceeding was also judicial, for the jurisdiction of the Court of Chancery was then not so clearly defined as it is now, and all petitions for relief in equity were addressed to the sovereign generally. Apart from judicial proceedings there is a class of cases where complaints have been made to high officers of state, and in which it has been held that statements made in such complaints are privileged, in the same manner as statements by masters relating to their servants. In none of these cases has it been suggested that there is any such absolute privilege as that contended for.

As to the other point, I think the evidence of express malice was sufficient.

MANISTY, J., concurred.

*Judgment for the plaintiff.*³

¹ 1 Wms. Saund. 120, 132.

² 3 Leon. 138.

³ *Dickson v. Wilton*, 1 F. & F. 419; *Woods v. Wiman*, 122 N. Y. 445 *Accord* — Ed.

SECTION VII. (*continued.*)

(c) COMMUNICATION MADE IN THE INTEREST OF THE RECIPIENT.

CHILD v. AFFLECK, AND WIFE.

IN THE KING'S BENCH, MAY 18, 1829.

[Reported in 9 Barnewall & Cresswell, 403.]

CASE for a libel. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Westminster sittings after Hilary term, it appeared in evidence that the plaintiff had been in the service of the defendants, Mrs. Affleck having before she hired her made inquiries of two persons, who gave her a good character. The plaintiff remained in that service a few months, and was afterwards hired by another person, who wrote to Mrs. Affleck for her character, and received the following answer, which was the alleged libel: "Mrs. A.'s compliments to Mrs. S., and is sorry that in reply to her inquiries respecting E. Child, nothing can be in justice said in her favor. She lived with Mrs. A. but for a few weeks, in which short time she frequently conducted herself disgracefully; and Mrs. A. is concerned to add she has, since her dismissal, been credibly informed she has been and now is a prostitute in Bury." In consequence of this letter the plaintiff was dismissed from her situation. It further appeared that after that letter was written, Mrs. Affleck went to the persons who had recommended the plaintiff to her, and made a similar statement to them. Upon this evidence it was contended, for the defendants, that there was no proof of malice, and that consequently the plaintiff must be nonsuited. On the other hand, it was urged that Mrs. Affleck's statement of what the plaintiff's conduct had been after she left her service was not privileged, and that, at all events, that part of the letter and the statement that she voluntarily made to other persons, and not in answer to any inquiries, were evidence of malice. Lord Tenterden, C. J., was of opinion that the latter part of the letter was privileged, and that the other communications being made to persons who had recommended the plaintiff, were not evidence of malice, and he directed a nonsuit.

F. Kelly now moved for a rule *nisi* for a new trial.¹

PARKE, J. The rule laid down by Lord Mansfield, in *Edmonson v. Stevenson*,² has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should

¹ The argument for the plaintiff and the opinions of LORD TENTERDEN, C. J., BAYLEY, and LITLEDALE, JJ., are omitted. — Ed.

² Bull. N. P. 8.

be directly proved." The question then is, whether the plaintiff in this case adduced evidence, which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Prima facie* it is fair, and undoubtedly a person asked as to the character of a servant may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*,¹ evidence of the good conduct of the servant was given, and the communication also appeared to be officious. In *Blackburn v. Blackburn*,² the occasion of writing the alleged libel did not distinctly appear, it was therefore properly left to the jury to say, whether it was confidential and privileged or not, and they found that it was not. Here the letter was undoubtedly *prima facie* privileged, the plaintiff, therefore, was bound to prove express malice in order to take away the privilege. *Rule refused.*³

¹ 3 B. & P. 587.² 4 Bing. 395.

³ *Servant Cases*.—*Edmonson v. Stevenson*, Bull. N. P. 8; *Weatherston v. Hawkins*, 1 T. R. 110; *Rogers v. Clifton*, 3 B. & P. 587; *Pattison v. Jones*, 8 B. & C. 578; *Gardner v. Slade*, 13 Q. B. 796; *Murdoch v. Funduklian*, 2 T. L. R. 614 (reversing s. c. 2 T. L. R. 215) *Accord*.

Commercial Agency Cases.—*Lemay v. Chamberlain*, 10 Ont. 638; *Todd v. Dun*, 12 Ont. 791; *Erber v. Dun*, 12 Fed. Rep. 526; *Johnson v. Bradstreet Co.*, 77 Ga. 172; *Pollasky v. Minchener*, 81 Mich. 280; *Mitchell v. Bradstreet Co.*, (Mo. 1898) 22 S. W. R. 358, 724; *King v. Patterson*, 49 N. J. 417; *Taylor v. Church*, 8 N. Y. 452; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *Bradstreet Co. v. Gill*, 73 Texas, 115 *Accord*.

Macintosh v. Dun [1908], A. C. 390 *Contra*.

But information given to persons having no interest in the mercantile standing of the plaintiff—for example, reports sent by a commercial agency to its subscribers generally—is not privileged. *Erber v. Dun*, 12 Fed. Rep. 526; *Trussell v. Scarlett*, 18 Fed. Rep. 214 (criticising *Beardsley v. Tappan*, 5 Blatchford, 497); *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771; *Pollasky v. Minchener*, 81 Mich. 280; *Ormsby v. Douglass*, 37 N. Y. 477; *State v. Lonsdale*, 48 Wis. 348.

For other cases of communications privileged because made in answer to proper inquiries, see *Cockayne v. Hodgkinson*, 5 C. & P. 543; *Storey v. Challand*, 8 C. & P. 234; *Kine v. Sewell*, 8 M. & W. 297; *Hopwood v. Thorn*, 8 C. B. 293; *Robshan v. Smith*, 38 L. T. Rep. 423; *Weldon v. Winslow*, Odgers, Lib. & Sl. (2d ed.) 210; *Zuckerman v. Sonnenschein*, 62 Ill. 115; *Atwill v. Mackintosh*, 120 Mass. 177; *Howland v. Blake Co.*, 156 Mass. 543; *Fahr v. Hayes*, 50 N. J. 275; *Posnett v. Marble*, 62 Vt. 481; *Rude v. Nass*, 79 Wis. 321.

Fiduciary Relations.—Communications made in the line of a business duty, for example, by an agent or employee to his principal or employer are privileged. *Wright v. Woodgate*, 2 C. M. & R. 573; *Scarll v. Dixon*, 4 F. & F. 250; *Stace v. Griffith*, L. R. 2 P. C. 420; *Hume v. Marshall*, 42 J. P. 136; *Washburn v. Cooke*, 8 Den. 110; *Lewis v. Chapman*, 16 N. Y. 369.

Family Relations.—A *bona fide* communication by a brother to his sister reflecting on the character of her suitor is privileged. *Anon.* 2 Smith, 4, cited; *Adams v. Coleridge*, 1 T. L. R. 4. So is a similar communication by a son-in-law to his mother-in-law. *Todd v. Hawkins*, 2 M. & Rob. 20, 3 C. & P. 88, s. c. — Ed.

COXHEAD v. RICHARDS.

IN THE COMMON PLEAS, JANUARY 31, 1846.

[Reported in 2 Common Bench Reports, 569.]

TINDAL, C. J.¹ This was an action upon the case for the publication of a false and malicious libel, in the form of a letter written by one John Cass, the first mate of a ship called *The England*, to the defendant; the letter stating that the plaintiff, who was the captain of the ship, and then in command of her, had been in a state of constant drunkenness during part of the voyage, whereby the ship and crew had been exposed to continual danger: and the publication by the defendant was, the communication by him of this letter to the owner of the ship, by reason whereof — which was the special damage alleged in the declaration — the plaintiff was dismissed from the ship, and lost his employment.

The defendant pleaded — first, not guilty; secondly, that the charges made by the mate against the plaintiff in his letter, were true; and, lastly, that the shipowner did not dismiss the captain by reason, and in consequence, of the communication of the letter to him.

Upon the last two issues a verdict was found for the plaintiff; but, upon the first issue, for the defendant.

I told the jury at the trial, that the occasion and circumstances under which the communication of this letter took place, were such, as, in my opinion, to furnish a legal excuse for making the communication; and that the inference of malice, — which the law *prima facie* draws from the bare act of publishing any statements false in fact, containing matter to the reproach and prejudice of another, — was thereby rebutted; and that the plaintiff, to entitle himself to a verdict, must show malice in fact: concluding by telling them that they should find their verdict for the defendant, if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed to be a duty; but, for the plaintiff, if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff. And the only question now before us, is, whether, upon the evidence given at the trial, such direction was right.

There was no evidence whatever that the defendant was actuated by any sinister motive in communicating the letter to Mr. Ward, the shipowner: on the contrary, all the evidence went to prove that what he did he did under the full belief that he was performing a duty, however mistaken he might be as to the existence of such duty, or in his mode of performing it. The writer of the letter was no stranger to the defendant: on the contrary, both were proved to have been on terms

¹ Only this opinion and the dissenting opinion of CRESSWELL, J., are given. ERLE, J., concurred with the Lord Chief Justice; COLTMAN, J., agreed with CRESSWELL, J. — ED.

of friendship with each other for some years; and, from the tenor of the letter itself, it must be inferred the defendant was a person upon whose judgment the writer of the letter placed great reliance, the letter itself being written for the professed purpose of obtaining his advice how to act, under a very pressing difficulty. The letter was framed in very artful terms, such as were calculated to induce the most wary and prudent man (knowing the writer) to place reliance on the truth of its details: and there can be no doubt but that the defendant did in fact thoroughly believe the contents to be true, amongst other things, that the ship, of which Mr. Ward was the owner, and the crew and cargo on board the same, had been exposed to very imminent risk, by the continued intoxication of the captain on the voyage from the French coast to Llanelly, where the ship then was, and that the voyage to the Eastern Seas, for which the ship was chartered, would be continually exposed to the same hazard, if the vessel should continue under his command. In this state of facts, after the letter had been a few days in his hands, the defendant considered it to be his duty to communicate its contents to Mr. Ward, whose interests were so nearly concerned in the information; not communicating it to the public, but to Mr. Ward; and not accompanying such disclosure with any directions or advice, but merely putting him in possession of the facts stated in the letter, that he might be in a condition to investigate the truth, and take such steps as prudence and justice to the parties concerned required: in making which disclosure he did not act hastily or unadvisedly, but consulted two persons well qualified to give good advice on such an emergency—the one, an Elder Brother of the Trinity House—the other, one of the most eminent ship-owners in London: in conformity with whose advice he gave up the letter to the owner of the ship. At the same time, if the defendant took a course which was not justifiable in point of law, although it proceeded from an error in judgment only, not of intention, still it is undoubtedly he, and not the plaintiff, who must suffer for such error.

The only question is, whether the case does or does not fall within the principle, well recognized and established in the law, relating to privileged or confidential communications; and, in determining this question, two points may, as I conceive, be considered as settled—first, that if the defendant had had any personal interest in the subject-matter to which the letter related, as, if he had been a part-owner of the ship, or an underwriter on the ship, or had had any property on board, the communication of such a letter to Mr. Ward would have fallen clearly within the rule relating to excusable publications—and, secondly, that if the danger disclosed by the letter, either to the ship or the cargo, or the ship's company, had been so immediate as that the disclosure to the shipowner was necessary to avert such danger, then, upon the ground of social duty, by which every man is bound to his neighbor, the defendant would have been not only justified in making the disclosure, but would have been *bound* to make it. A man who

received a letter informing him that his neighbor's house would be plundered or burnt on the night following by A. and B., and which he himself believed, and had reason to believe, to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A. and B. The question before us appears, therefore, to be narrowed to the consideration of the facts which bear upon these two particular qualifications and restrictions of the general principle.

As to the first, I do not find the rule of law is so narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up. In *Pattison v. Jones*,¹ the defendant, who had discharged the plaintiff from his service, wrote a letter to the person who was about to engage him, unsolicited; he was therefore a volunteer in the matter; and might be considered as a stranger, having no interest in the business; but, neither at the trial, nor on the motion before the court, was it suggested that the letter was, on that account, an unprivileged communication; but it was left to the jury to say whether the communication was honest or malicious. Again, in *Child v. Affleck and Wife*, the statement, by the former mistress, of the conduct of her servant, not only during her service, but after she had left it, was held to be privileged. The rule appears to have been correctly laid down by the Court of Exchequer, that, "if fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected, for the common convenience and welfare of society; and the law has not restricted the right to make them, within any narrow limits."² In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot, therefore, properly be treated as a complete stranger to the subject-matter of inquiry, even if the rule excluded strangers from the privilege.

Upon the second ground of qualification — was the danger sufficiently imminent to justify the communication — it is true, that the letter, which came to the defendant's hands about the 14th of December, contains within it the information that the ship cannot get out of harbor before the end of the month. It was urged that the defendant, instead of communicating the letter to the owner, might have instituted some inquiry himself. But it is to be observed that every day the ship remained under the command of such a person as the plaintiff was described to be, the ship and crew continued exposed to hazard, though

¹ 8 B. & C. 578.

² 1 C. M. & R. 181.

not so great hazard as when at sea ; not to mention the immediate injury to the shipowner which must necessarily follow from want of discipline of the crew, and the bad example of such a master. And, after all, it would be too much to say, that, even if the thing had been practicable, any duty was cast upon *the defendant*, to lay out his time or money in the investigation of the charge.

Upon the consideration of the case, I think it was the duty of the defendant not to keep the knowledge he gained by this letter himself, and thereby make himself responsible, in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew — that a prudent and reasonable man would have done the same ; that the disclosure was made, not publicly, but privately to the owner, that is, to the person who of all the world was the best qualified, both from his interest in the subject-matter, and his knowledge of his own officers, to form the most just conclusion as to its truth, and to adopt the most proper and effective measures to avert the danger ; after which disclosure, not the defendant, but the owner, became liable to the plaintiff, if the owner took steps which were not justifiable ; as, by unjustly dismissing him from his employment, if the letter was untrue. And, as all this was done with entire honesty of purpose, and in the full belief of the truth of the information, — and that, a reasonable belief, — I am still of the same opinion which I entertained at the trial, that this case ranges itself within the pale of privileged communication, and that the action is not maintainable.

I therefore think the rule for setting aside the verdict and for a new trial, should be discharged.

CRESSWELL, J. I cannot, without much regret, express an opinion in this case at variance with that which is entertained by my lord and one of my learned brothers. But, having given full consideration to the arguments urged at the bar, and the cases cited, and not being able to shake off the impression which they made in favor of the plaintiff, I am bound to act upon the opinion that I have formed. I will not repeat the facts of the case, which have been already stated, but proceed shortly to explain the grounds upon which my opinion rests.

There is no doubt that the letter published by the defendant of the plaintiff, was defamatory ; and the truth of its contents could not be proved. The plaintiff was, therefore, entitled to maintain an action against the publisher of that letter, unless the occasion on which it was published made the publication of such letter a lawful act, as far as the plaintiff was concerned, if done in good faith, and without actual malice. To sustain an action for a libel or slander, the plaintiff must show that it was malicious ; but every unauthorized publication of defamatory matter is, in point of law, to be considered as malicious. The law, however, on a principle of policy and convenience, authorizes many communications, although they affect the characters of individuals ; and I take it to be a question of law, whether the communication is authorized or not. If it be authorized, the legal presumption of malice arising

from the unauthorized publication of defamatory matter, fails, and the plaintiff, to sustain his action, must prove actual malice, or, as it is usually expressed, malice in fact. In the present case, the existence of malice in fact was negatived by the jury; and if my lord was right in telling them, that, in the absence of malice in fact, the publication of the letter was privileged, this rule should be discharged. It therefore becomes necessary to inquire within what limits and boundaries the law authorizes the publication of defamatory matter. Perhaps the best description of those limits and boundaries that can be given in few words, is to be found in the judgment of Parke, B., in *Toogood v. Spyring*: "The law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." It was not contended in this case that any *legal* duty bound the defendant to communicate to the shipowner the contents of the letter he had received, nor was the communication made in the conduct of his own affairs, nor was his interest concerned: the authority for the publication, if any, must therefore be derived from some *moral* duty, public or private, which it was incumbent upon him to discharge. I think it impossible to say that the defendant was called upon by any *public duty* to make the communication; neither his own situation nor that of any of the parties concerned, nor the interests at stake, were such as to affect the public weal. Was there then any *private* duty? There was no relation of principal and agent between the shipowner and the defendant, nor was any trust or confidence reposed by the former in the latter; there was no relationship or intimacy between them; no inquiries had been made; they were, until the time in question, strangers: the duty, if it existed at all as between them, must, therefore, have arisen from the mere circumstance of their being fellow-subjects of the realm. But the same relation existed between the defendant and the plaintiff. If the property of the shipowner on the one hand was at stake, the character of the captain was at stake on the other; and I cannot but think that the moral duty not to publish of the latter defamatory matter which he did not *know* to be true, was quite as strong as the duty to communicate to the shipowner that which he *believed* to be true. Was, then, the defendant bound by any moral duty towards the writer of the letter, to make the communication? Surely not. If the captain had misconducted himself, the mate was capable of observing it, and was as capable of communicating it to the owner as to the defendant. The crew were, in like manner, capable of observing and acting for themselves. The mate (if he really believed that which he wrote to be true) might, indeed, be under a moral duty to communicate it to his owner: but the defendant had no right to take that vicarious duty upon himself: he was not requested by the mate to do so, but was, on the contrary, enjoined *not* to make the communication.

I will not attempt to comment upon the very numerous cases that

were quoted at the bar on the one side and on the other, but will advert to one or two which tend to explain the term "moral duty," and see whether it has ever been held to authorize the publication of defamatory matter under circumstances similar to those which exist in the present case. In *Bromage v. Prosser*, Bayley, J., in his very elaborate judgment, speaks of slander as "*prima facie* excusable on account of the cause of speaking or writing it, in the case of servants' characters, confidential advice, or communications to those who ask it or have a right to expect it." With regard to the characters of servants and agents, it is so manifestly for the advantage of society that those who are about to employ them should be enabled to learn what their previous conduct has been, that it may be well deemed the moral duty of former employers to answer inquiries to the best of their belief. But, according to the opinion of the same learned judge, intimated in *Pattison v. Jones*,¹ it is necessary that *inquiry* should be made, in order to render lawful the communication of defamatory matter, although he was also of opinion that such inquiry may be invited by the former master. And in *Rogers v. Clifton*, Chambre, J., quoted a similar opinion of Lord Mansfield's, expressed in *Lowry v. Aikenhead*.²

It was contended during the argument of this case, that the protection given to masters when speaking of the conduct of servants, was more extensive, and applied also to communications made to former employers; and *Child v. Affleck* was mentioned as an instance. But the communication to the former master was not made a ground of action in that case, and was introduced only as evidence that the statement made in answer to the inquiry of the new master was malicious. The same observation applies to *Rogers v. Clifton*; and it may be collected from that report that Chambre, J., was of opinion, that, where statements are made which are not in answer to inquiries, the defendant must plead, and prove, a justification.

Again, where a party asks advice or information upon a subject on which he is interested; or where the relative position of two parties is such that the one has a right to expect confidential information and advice from the other; it may be a moral duty to answer such inquiries and give such information and advice; and the statements made may be rendered lawful by the occasion, although defamatory of some third person, as in *Dunman v. Bigg*³ and *Todd v. Hawkins*.⁴

Two cases — *Herver v. Dowson*⁵ and *Cleaver v. Sarraude*, reported in *M'Dougall v. Claridge*⁶ — were quoted as authorities for giving a more extended meaning to the term "moral duty," and making it include all cases where one man had information, which, if true, it would be important for another to know. But the notes of those cases are very short: in the former the precise circumstances under which the statement was made — see *King v. Watts*,⁷ that such a statement made

¹ 8 B. & C. 578.

² 1 Campb. 269.

³ Bull. N. P. 8.

⁴ Mich. 8 G. 3, 3 B. & P. 594.

⁵ 2 M. & Rob. 20, 8 C. & P. 88.

⁶ 1 Campb. 268.

⁷ 8 C. & P. 614.

without inquiry is not lawful—and in the latter, the position of the defendant with reference to the Bishop of Durham, to whom it was made, are left unexplained. I cannot, therefore, consider them as satisfactory authorities for the position to establish which they were quoted: and, in the absence of any clear and precise authority in favor of it, I cannot persuade myself that it is correct, as, if established at all, it must be at the expense of another moral duty, viz. not to publish defamatory matter unless you *know* it to be true.

For these reasons, I am of opinion, that the rule for a new trial should be made absolute.

The court being thus divided in opinion, the rule for a new trial fell to the ground, and the defendant retained his verdict.¹

BENNETT v. DEACON.

IN THE COMMON PLEAS, MAY 5, 1846.

[*Reported in 2 Common Bench Reports, 628.*]

CASE, for slander of the plaintiff in his trade.

The defendant pleaded not guilty; whereupon issue was joined.

The cause was tried before Coltman, J. The plaintiff is a wheelwright, carrying on business in the Wandsworth Road, near the terminus of the South-western Railway. The defendant is a timber-dealer and builder in the same neighborhood. On the 8th of October last, one William Clark, a timber-dealer who resided at Chiddingfold, in Surrey, having brought up a quantity of ash timber by the railway, entered into a treaty for the sale of it to the plaintiff on the 9th of October. Before the sale had been finally agreed upon, the defendant, meeting Clark in the road, inquired of him if he had sold his timber yet; to which Clark answered, "I believe I have: Bennett is going to have it." The defendant then asked, "Are you going to have ready money for it?" To this Clark answered, "I am going to have half ready money, and the other at a month's credit;" adding that he was

¹ "If it had been necessary, I should have been fully prepared to go the whole length of the doctrine laid down by Tindal, C. J., in the case of *Coxhead v. Richards*," *per* WILLES, J., in *Amann v. Damm*, 8 C. B. N. S. 592, 602. BLACKBURN, J., in *Davies v. Sneed*, L. R. 5 Q. B. 605, 611, and LINDLEY, J., in *Stuart v. Bell*, '91, 2 Q. B. 341, 347, expressed similar approval of the opinion of Tindal, C. J.

Vanspike v. Cleyson, Cro. El. 441; *Peacock v. Reynell*, 2 Br. & Gold. 151, 15 C. B. N. S. 418, cited, s. c.; *Herver v. Dowson*, Bull. N. P. 8; *Cleaver v. Sarrauda*, 1 Camp. 268, cited; *Picton v. Jackman*, 4 C. & P. 257; *Dixon v. Smith*, 29 L. J. Ex. 125, 126; *Masters v. Burgess*, 3 T. L. R. 96; *Stuart v. Bell*, '91, 2 Q. B. 341; *Hart v. Reed*, 1 B. Mon. 166; *Fresh v. Cutter*, 73 Md. 37; *Noonan v. Orton*, 32 Wis. 106 *Accord*.

Cockayn v. Hutchinson, 5 C. & P. 543 (*semble*); *King v. Watts*, 8 C. & P. 614; *Brown v. Vannaman* (Wis. 1893), 55 N. W. R. 183 *Contra*. — Ed.

going to get the timber drawn from the railway to Bennett's yard, in order to avoid demurrage. The defendant then remarked: "If you draw it down to Bennett's yard, you'll lose it; for, he owes me about £25, and I am going to arrest him next week for my money, and your timber will help to pay my debt." In consequence of this statement Clark declined to sell the timber in question to the plaintiff.

The learned judge thought that, though the communication might have been privileged if *bona fide* made in answer to inquiries addressed to the defendant as to the credit and circumstances of the plaintiff, yet, inasmuch as he had *volunteered* the information, the case did not fall within the exception to the general rule.

The jury returned a verdict for the plaintiff, damages 40s.

Byles, Serjt., in the course of the term, obtained a rule *nisi* for a new trial, on the ground of misdirection.

Talfourd, Serjt., now showed cause.

TINDAL, C. J. I am unable to distinguish the case in principle from *Coxhead v. Richards*; and I see no reason at present to alter the opinion I there expressed. It seems to me that the communication in question, having been made *bona fide* to Clark in the ordinary course of, and in relation to, his business, was privileged, and that the rule should be made absolute.

COLTMAN, J., and CRESSWELL, J., differed from TINDAL, C. J., and adhered to the opinions given by them in *Coxhead v. Richards*.

ERLE, J., concurred with the Chief Justice.

The court being equally divided in opinion, the verdict to stand.

"THE COUNT JOANNES" v. JOSEPH L. BENNETT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1862.

[Reported in 5 Allen, 169.]

TORT brought on the 12th of June, 1860, in the name of "The Count Joannes (born 'George Jones,')" for two libels upon him contained in letters to a woman to whom he was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage.

At the trial in this court, before Merrick, J., it appeared that the defendant had for several years held the relation of pastor to the parents of the woman, as members of his church, and to the daughter, as a member of his choir; and there was evidence tending to show that he was on the most intimate terms of friendship with the parents, and that, on the 18th of May, 1860, being on a visit from his present residence in Lockport, New York, he called upon the father at his place of

business in Boston, and was urged by him to accompany him to his residence in South Boston, the father stating that both he and his wife were in great distress of mind and anxiety about their daughter, and that they feared she would engage herself in marriage to the plaintiff. On their way to South Boston, the father stated to the defendant what he and his wife had heard and apprehended about the plaintiff, and their views with regard to his being an unsuitable match for their daughter, who, with a young child by a former husband, was living with them. On reaching the house, it was found that the daughter had gone out; and it was then arranged that the defendant should write a letter, and materials for that purpose were furnished, and the letter set forth in the first count¹ was written, addressed to the daughter, and left open and unsealed with the mother, after the principal portion of it had been read aloud at the tea-table in the presence of the parents and a confidential friend of the family. On leaving, the defendant was further requested to do what he thought best to induce the daughter to break up the match.

The judge ruled that the letter was not a privileged communication; and a verdict was returned for the plaintiff. The defendant alleged exceptions.

G. W. Warren, for the defendant.

The plaintiff, *pro se*.

BIGELOW, C. J. The doctrine, that the cause or occasion of a publication of defamatory matter may afford a sufficient justification in an action for damages, has been stated in the form of a legal rule or canon, which has been sanctioned by high judicial authority. The statement is this: A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty to perform, is privileged, if made to a person having a corresponding interest or duty, although it contains defamatory matter, which without such privilege would be libellous and actionable. It would be difficult to state the result of judicial decisions on this subject, and of the principles on which they rest, in a more concise, accurate and intelligible form. *Harrison v. Bush*, *Gassett v. Gilbert*,² and cases cited. It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter set out in the first count of the declaration, which bring the publication within the first branch of this rule. He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libellous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. It did not even in-

¹ Only what relates to this count is given. — Ed.

² 6 Gray, 94.

volve any sacrifice of his feelings or injury to his affections. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation towards the parties as to give him any interest in the subject-matter to which his communication concerning the plaintiff related. *Todd v. Hawkins*.¹ No doubt, he acted from laudable motives in writing it. But these do not of themselves afford a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations on private character.

It is equally clear that the defendant did not write and publish the alleged libellous communications in the exercise of any legal or moral duty. He stood in no such relation towards the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances while he retained his relation of religious teacher and pastor towards the person to whom this letter in question was addressed, and towards her parents, he certainly had no duty resting upon him after that relation had terminated. He then stood in no other attitude towards the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libellous statements concerning another. It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for a party to shelter himself from the consequences of uttering or publishing a slander or libel under a privilege which could be readily made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty. It seems to us, therefore, that on the question of justification set up by the defendant under a supposed privilege which authorized him to write the letter set out in the first count, the instructions of the court were correct.²

¹ 2 M. & Rob. 20; s. c. 8 C. & P. 88.

² *Krebs v. Oliver*, 6 Gray, 239; *Byam v. Collins*, 111 N. Y. 143 (DANFORTH, J., dissenting) *Accord*.

Anon., 15 C. B. N. S. 410 (cited); *Adcock v. Marsh*, 8 Ired. 360 *Contra*. — *Ed.*

MIRA BEALS v. AUGUSTIN THOMPSON AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1889.

[Reported in 149 *Massachusetts Reports*, 405.]

TORT for a libel contained in letters written by the defendant to the plaintiff's husband, and charging her with having been guilty of dishonorable conduct, deception, and ingratitude and dishonesty towards the defendant, whereby she lost the comfort and society of her husband, who refused to live longer with her.¹

The jury returned a verdict for the plaintiff in the sum of \$30,000; and the defendant alleged exceptions.

J. L. Hunt, for the defendant.

R. M. Morse, Jr. (*F. A. Dearborn* with him), for the plaintiff.

FIELD, J. The exceptions also state, that the court refused "to instruct the jury that each of the letters mentioned in plaintiff's declaration was a privileged communication, and that this action could not therefore be maintained," and "instructed the jury that no privilege was shown." No facts are recited in the bill of exceptions which tend to show that the occasion was privileged, except such as may be inferred from the relation of the parties to each other, and from the contents of the letters. Taking the case most favorably for the defendant, it is that the plaintiff owed a debt to the defendant for money lent to her before her marriage, which, after her marriage with a rich man, she refused to pay, under circumstances which showed ingratitude on her part, and that the defendant wrote a letter to the husband defamatory of the plaintiff, for the purpose of compelling him or her to pay the debt. This is not a lawful method of collecting a debt, or of compelling another person than the debtor to pay it. The defendant owed no duty to the husband to inform him of the bad conduct of his wife before her marriage, and the husband was under no obligation to pay the debts of his wife contracted before her marriage. There is no evidence that the defendant in sending the letter to the husband was acting in the discharge of any duty, social, moral, or legal. The ruling was right. *Gassett v. Gilbert*,² *Krebs v. Oliver*,³ *Joannes v. Bennett*, *Shurtleff v. Parker*,⁴ *White v. Nicholls*.⁵ *Exceptions overruled*.⁶

¹ The statement of the case has been condensed. — ED.

² 6 Gray, 94.

³ 12 Gray, 239.

⁴ 130 Mass. 293.

⁵ 3 How. 266.

⁶ In *Simmonds v. Dunne*, Ir. R. 5 C. L. 358; *Ober v. Schiffing*, 102 Ind. 191; *York v. Johnson*, 116 Mass. 482, the communications were not privileged for want of a legitimate interest or duty on the part of the defendant. — ED.

SECTION VII. (*continued.*)

(d) EXCESS OF PRIVILEGE.

TOOGOOD v. SPYRING.

IN THE EXCHEQUER, TRINITY TERM, 1834.

[*Reported in 1 Crompton, Meeson & Roscoe, 181.*]

THE judgment of the court was delivered by

PARKE, B.¹ In this case, which was argued before my Brothers BOLAND, ALDERSON, GURNEY, and myself, a motion was made for a non-suit, or a new trial, on the ground of misdirection. It was an action of slander, for words alleged to be spoken of the plaintiff as a journeyman carpenter, on three different occasions. It appeared that the defendant, who was a tenant of the Earl of Devon, required some work to be done on the premises occupied by him under the earl, and the plaintiff, who was generally employed by Brinsdon, the earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner; and, during the progress of the work, got drunk; and some circumstances occurred which induced the defendant to believe that he had broken open the cellar door, and so obtained access to his cider. The defendant a day or two afterwards met the plaintiff in the presence of a person named Taylor, and charged him with having broken open his cellar door with a chisel, and also with having got drunk. The plaintiff denied the charges. The defendant then said he would have it cleared up, and went to look for Brinsdon; he afterwards returned and spoke to Taylor, in the absence of the plaintiff; and, in answer to a question of Taylor's, said he was confident that the plaintiff had broken open the door. On the same day the defendant saw Brinsdon, and complained to him that the plaintiff had been negligent in his work, had got drunk, and he thought he had broken open the door, and requested him to go with him in order to examine it. Upon the trial it was objected, that these were what are usually termed "privileged communications." The learned judge thought that the statement to Brinsdon might be so, but not the charge made in the presence of Taylor; and in respect of that charge, and of what was afterwards said to Taylor, both which statements formed the subject of the action, the plaintiff had a verdict. We agree in his opinion, that the communication to Brinsdon was protected, and that the statement, upon the second meeting, to Taylor, in the plaintiff's absence, was not; but we think, upon consideration, that the statement made to the plaintiff, though in the presence of Taylor, falls within the class of communications ordinarily called privileged; that is, cases where the occasion of the publi-

¹ Only the opinion of the court is given. — Ed.

cation affords a defence in the absence of express malice. In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If *fairly* warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits.

Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is that of a former master giving the character of a discharged servant; and I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed¹), the simple fact that there has been some casual bystander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of a master *bona fide* to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means *of necessity* take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is *sought* for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows to such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorized, though it may be a circumstance to be left with others, including the style and character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted *bona fide* in making the charge, or been influenced by malicious motives.² In the present case, the defendant stood in such

¹ Child v. Affleck, 4 Man. & Ryl. 590; 9 B & C. 408.

² Jones v. Thomas, 34 W. R. 104; Pittard v. Oliver, '92, 1 Q. B. 474; Broughton v. McGrew, 39 Fed. Rep. 672; Brow v. Hathaway, 13 All. 239; Billings v. Fairbanks,

a relation with respect to the plaintiff, though not strictly that of master, as to authorize him to impute blame to him, provided it was done fairly and honestly, for any supposed misconduct in the course of his employment; and we think that the fact, that the imputation was made in Taylor's presence, does not, *of itself*, render the communication unwarranted and officious, but at most is a circumstance to be left to the consideration of the jury. We agree with the learned judge, that the statement to Taylor, in the plaintiff's absence, was unauthorized and officious, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false; but, inasmuch as no damages have been separately given upon this part of the charge alone, to which the fourth count is adapted, we cannot support a general verdict, if the learned judge was wrong in his opinion as to the statement to the plaintiff in Taylor's presence; and, as we think that at all events it should have been left to the jury whether the defendant acted maliciously or not on that occasion, there must be a new trial.

Rule absolute for a new trial.

DUNCOMBE, Esq., M. P., v. DANIEL, Esq.

IN THE QUEEN'S BENCH, JANUARY 13, 1838.

[*Reported in Willmore, Wollaston, and Hodges, 101.*¹]

LIBEL. The defendant pleaded not guilty, and also several pleas of justification. It was proved, at the trial before Lord Denman, C. J., at the Middlesex sittings, after last term, that the plaintiff had become a candidate to represent the borough of Finsbury in Parliament; and that he had addressed a circular letter to the electors of the borough, of whom the defendant was one, asking for their suffrages. That the first publication complained of, was written, as an answer to the plaintiff's circular; and the second, in consequence of the manner in which the defendant had been treated at the hustings, by the plaintiff and his friends, when the defendant was endeavoring to compel the plaintiff to answer certain matters set forth in the answer which he had published to the plaintiff's circular. Both the publications contained matter relating to the private conduct of the plaintiff, and imputed to him fraudulent behavior in certain money transactions; and misconduct with regard to certain statements put before the Vice-Chancellor, on a motion to obtain an injunction to stay proceedings on a judgment, which a creditor had obtained against him. The defendant's counsel

136 Mass. 177, 139 Mass. 66; Keane v. Sprague (N. Y. City Court), 30 Alb. L. J. 283 *Accord.*

Webber v. Vincent, 55 Hun, 612 *Contra.* — Ed.

¹ 6 C. & P. 222, s. c. — Ed.

contended, that it ought, under these circumstances, to be left to the jury to say, whether the publications were *bona fide*; and if they were found to be so, then, that under the plea of not guilty, the defendant was entitled to a verdict, on the ground that the publications being made by an elector to his brother electors, respecting the conduct of a candidate who was then seeking to obtain their suffrages, must be treated as privileged. Lord Denman, however, refused to direct the jury to find a verdict for the defendant, on that ground; and left the jury to say, whether they thought the justifications had been in fact made out. A verdict was returned for the plaintiff, — damages, £100.

Sir W. W. Follett now moved for a rule, to show cause why a new trial should not be granted, on the ground of a misdirection on this point. — Even on the plea of not guilty, the publication was justified, considering the position of the parties, and the time when the publication took place. It was a privileged communication, being a *bona fide* statement, made by one elector to the rest of the constituency. All the parties were interested in the election which was then going on; the plaintiff was a candidate; he submitted his pretensions to the electors, and therefore gave them a right to examine into his character and conduct. He asked them to declare him entitled to the honor of being their representative; and they were entitled to see whether he was deserving of that honor. This was clearly the right of all the electors, and it was the right of each individual elector. Each of the electors might inform his brother electors of any matter relating to a subject in which they all had a common interest, provided that the statement was made *bona fide*, and that was a question for the jury. [LORD DENMAN, C. J. How may this supposed right of privileged publication be exercised?] — As it was here, by sending the communication to a newspaper. [COLERIDGE, J. Then you must contend for a right of publication to all the world, for the newspapers are not read by the electors of Finsbury alone.] — If the publication cannot be made to the electors, without all the world becoming acquainted with it, then the publication to all the world may be justified on the ground of necessity. Try this question in this manner. The elector has a right *bona fide*, to publish to his brother electors matter relating to the conduct and character of the candidate. Would he not have a right to go on the hustings and make the statement? Yet that would in effect be a publication to all the world; for there are no means of preventing non-electors from being present. He would clearly have a right to send a letter to each individual elector. He would have a right to print a placard and circulate it in the borough. Then may he not publish it in the newspapers? This case may come within the rule adopted in the cases where a privileged communication has been made in the presence of a third party. *Toogood v. Spyring* decided that a charge brought by A. against B. in the presence of a third person, was privileged, if done honestly and *bona fide*; and that the circumstance of its being stated in the presence of a third person, did not of itself make it unauthorized, but that

it was a question to be left to the jury to determine from the circumstances, whether A. acted *bona fide*, or was influenced by malicious motives. The question of *bona fides* ought to have been left to the jury in this case. There are many cases in which parties making publications solely for their private advantage, have been held to be protected, if they have acted *bona fide*. *Delaney v. Jones*,¹ and *Stockley v. Clement*.² All these cases show, that where the parties have an interest in the subject, they are protected in publishing *bona fide* statements, which, but for such circumstances, would be libellous.

LORD DENMAN, C. J. It does not appear to us, that on this point there should be any rule, for however large may be the privileges of electors, it would be extravagant to suppose, that they can justify the publication to all the world of facts injurious to the character of any person who happens to stand in the situation of a candidate.

LITTLEDALE, WILLIAMS, and COLERIDGE, JJ., concurred.

*Rule refused.*³

ISAAC MARKS v. JAMES H. BAKER.

IN THE SUPREME COURT, MINNESOTA, JULY 25, 1881.

[Reported in 28 Minnesota Reports, 162.]

BERRY, J. This is an action for libel. The plaintiff was, at the times hereinafter mentioned, treasurer of the city of Mankato, and, as such, custodian of the moneys, and from April 1 to 6, 1880, a candidate for re-election to the same office, at an election fixed for the latter day. The defendants were residents and tax-payers of the city, and publishers thereof of the Mankato Free Press, a weekly newspaper, and as such they published therein, on April 2, 1880, the article complained of, in which, as the plaintiff claims in his complaint, they charged and intended to charge the defendant as treasurer with embezzling city funds. It is alleged in the complaint that the matter charged as libellous was of and concerning the plaintiff in his office — that it was

¹ 4 Esp. 191.

² 4 Bing. 162.

³ *Jones v. Varnum*, 21 Fla. 431; *State v. Haskins*, 124 Iowa, 656; *Bronson v. Bruce*, 59 Mich. 467; *Wheaton v. Buchan*, 66 Mich. 307; *Belknap v. Ball*, 83 Mich. 583; *Aldrich v. Press Co.* 9 Minn. 133 (but see, *contra*, *Marks v. Baker*, *infra*); *Bigner v. Hodges*, 82 Miss. 215; *Lewis v. Few*, 5 Johns. 1; *Root v. King*, 7 Cow. 613; *Hunt v. Bennett*, 19 N. Y. 173; *Seeley v. Blair*, *Wright* (Ohio), 358, 683; *Knapp v. Campbell*, 14 Tex. Civ. Ap. 199; *Sweeney v. Baker*, 13 W. Va. 158 *Accord*.

But a communication to the electors alone is privileged, if made in good faith. *Wisdom v. Brown*, 1 T. L. R. 412; *Parkhurst v. Hamilton*, 3 T. L. R. 500; *Burke v. Mascarieth*, 81 Cal. 302 (*semble*); *Mott v. Dawson*, 46 Iowa, 533; *Bays v. Hunt*, 60 Iowa, 251; *State v. Balch*, 31 Kans. 465; *Commonwealth v. Wardwell*, 136 Mass. 164; *Briggs v. Garrett*, 111 Pa. 404.

But see, *contra*, *Smith v. Burrus*, 106 Mo. 94, where the distinction between fair comment and qualified privilege was overlooked. — ED.

false and defamatory, and that the publication was malicious. The answer denies malice, all intent to injure or defame plaintiff, any intention on defendants' part to charge him with embezzlement, and alleges that defendants published the article complained of, as a communication, solely for the purpose of calling the attention of the public to the matter therein referred to, viz., to a discrepancy in certain official reports tending to show that the plaintiff had failed to charge himself with the full amount of city funds which he had received from the county treasury, and with the view of obtaining an inquiry as to the cause of such discrepancy. The answer further alleges that "the publication was made in good faith; . . . that defendants believed that there was reasonable cause for the publication;" and "that they were then and there discharging a sacred and moral obligation as . . . editors and publishers." The reply puts these allegations of the answer in issue. Upon the trial it was admitted that, notwithstanding the discrepancy, (which in fact existed,) the plaintiff had accounted for the full sum received by him as city treasurer from the county treasurer, so that the defendants' charge or insinuation to the contrary was false.

Defendant, Baker, having been called for the defence, was asked the questions following, to which he made answers as follows, all against the objection and exception of the plaintiff:

(1) "Did you believe the report of the city recorder to be true? *Answer.* I did believe it to be true. (This report was that from which, as defendants in the alleged libel charged or insinuated, it appeared that plaintiff had failed to account for all the money received by him from the county treasurer.)

(2) "What was your object in publishing the article? *Answer.* I published it for the general public interest.

(3) "Did you have any other object in publishing the article? *Answer.* I did not.

(4) "You have stated that you had no other purpose than doing a public duty in publishing the article. I want to know what your object was, — to charge somebody with a crime, or whether you had some other object? *Answer.* To draw attention to the discrepancy of the two reports. I had seen what purported to be the official report of the county auditor, and I had seen the city recorder's; and the county auditor's showed that Marks, as city treasurer, had received from the county, during the fiscal year, \$115.02 more than the city recorder's report showed that he had received from the county for the same time. (These are the two reports between which the discrepancy was charged to exist.)

(5) "Did you, by publishing the article, intend to charge the plaintiff with embezzling any sum whatever? *Answer.* I did not."

The defence set up in the answer is, in effect, that the publication complained of is a privileged communication.

The rule is that a communication made in good faith upon any subject-matter in which the party communicating has an interest, or in reference

to which he has a duty, public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged; that in such case the inference of malice which the law draws from defamatory words is rebutted, and the *onus* of proving actual malice is cast upon the person claiming to have been defamed. *Too-good v. Spyring*; 2 *Addison on Torts*, § 1091; *Harrison v. Bush*; *Moak's Underhill on Torts*, 146; *Quinn v. Scott*.¹ That the subject-matter of the communication is one of public interest in the community of which the parties to the communication are members, is sufficient, as respects interest, to confer the privilege. *Purcell v. Sowler*; ² *Palmer v. City of Concord*; ³ *Cooley on Torts*, 217. The subject-matter of the communication in the case at bar was one of public interest in the city of Mankato, where the publication was made, and one in which the defendants had an interest as residents and tax-payers of the city. It was, therefore, a privileged communication, within the rule mentioned, if made in good faith.⁴

*Judgment affirmed.*⁵

GEORGE W. L. HATCH v. ELIAS N. LANE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1870.

[*Reported in 103 Massachusetts Reports*, 394.]

TORT for publishing in the "Taunton Daily Gazette" the following notice, signed by the defendant, concerning the plaintiff: "A young man named George Hatch having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business."

At the trial in the Superior Court, Wilkinson, J., ruled "that the publication was a privileged communication if made in good faith in a local newspaper published in Taunton and the jury should find it was a necessary or reasonable mode of giving notice." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.⁶

S. R. Townsend, for the plaintiff.

J. Brown, for the defendant, was not called upon.

WELLS, J. The case shows that the defendant was entitled to the benefit of his plea of privilege. No exception was taken to the ruling on that point. The exception is to the refusal of the court below to rule as requested by the plaintiff; "as matter of law, that the whole community had no such interest corresponding to the interest of the defendant in the subject-matter of the publication, as would authorize him to

¹ 22 Minn. 456.

² L. R. 2 C. P. Div. 215.

³ 48 N. H. 211.

⁴ The court found that the defendant acted in good faith. — ED.

⁵ *Briggs v. Garrett*, 111 Pa. 404 (*semble*); *Express Co. v. Copeland*, 64 Tex. 354 *Accord.* — ED.

⁶ The statement of the case is abridged. — ED.

make it through the medium of a public newspaper." The question thus raised relates only to the mode adopted to make the communication to those for whom it was properly intended. They were the customers of a baker, who "employed several drivers, selling and delivering bread in Taunton and adjoining towns." The fact that a communication is made in the hearing of others than the parties immediately interested will not, of itself, defeat the defence of privilege. *Brow v. Hathaway*.¹ If the circulation of the newspaper was more extensive than the routes of the defendant's business; or if the communication thereby came to the notice of persons not customers of the defendant, that fact would not, of itself, defeat the defence of privilege; nor necessarily prove malice. It would be evidence upon the question of express malice, to be considered by the jury. That question was submitted to the jury, under proper instructions; and the jury, by their verdict, have found that it was a reasonable mode of giving the notice; thus negating express malice. *Exceptions overruled*.²

WILLIAMSON v. FREER.

IN THE COMMON PLEAS, APRIL 20, 1874.

[*Reported in Law Reports, 9 Common Pleas, 393.*]

THIS was an action for a libel, tried before Brett, J., at the last assizes for Leicester. The facts were as follows: The plaintiff was employed as assistant in the shop of the defendant, a shoemaker, at Leicester. The defendant having accused the plaintiff of robbing him of money, sent two post-office telegrams to her father, who resided in London, to inform him of his suspicions. The first telegram was to this effect: "Come at once to Leicester, if you wish to save your child from appearing before a magistrate." The second was as follows: "Your child will be given in charge of the police unless you reply and come to-day. She has taken money out of the till."

The charge was persisted in down to the trial; but there was no evidence to support it. It did not appear that, beyond the officials of the post-office, through whose hands the telegrams passed, they had come to the knowledge of any other persons than the father, mother, and brother of the plaintiff.

The learned judge left it to the jury to say whether the statements were libellous, and whether it was reasonable to transmit them by telegraph rather than by post.

¹ 13 Allen, 239.

² *Delaney v. Jones*, 4 Esp. 191 (but see *Ley v. Lawson*, 4 A. & E. 798); *Commonwealth v. Featherston*, 9 Phila. 594; *Holliday v. Ontario Co.*, 33 Up. Can. Q. B. 558 (*semble*) *Accord*. — *Ed.*

The jury found that the statements were libellous, and that it was not reasonable to send them by telegraph, and they returned a verdict for the plaintiff, damages £100.

O'Malley, Q. C. (with him *Merewether*), pursuant to leave, moved to enter a verdict for the defendant.¹

BRETT, J. I reserved the point because I thought it was a very important one. It is whether, where a communication is to be made to a relative of a person against whom a charge is preferred, which communication would be privileged if sent by letter in the ordinary way, the privilege is not lost by sending it in the form of a telegram, — whether a communication in that form can be said to be made to one person, when in point of fact it passes through several hands before it reaches its ultimate destination. Privilege is not wanted unless the publication is libellous. The question then is whether the character of an innocent person is to be destroyed because the libeller thinks fit to send the libel in this shape rather than in a sealed letter. I do not mean to say that there was malice in fact here. But I agree with my Lord that sending the messages by telegraph when they might have been sent by letter was evidence of malice. I desire, however, to put this higher. I think that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes. It is like the case of a libel contained on the back of a post-card.² It was never meant by the Legislature that these facilities for postal and telegraphic communication should be used for the purpose of more easily disseminating libels. Where there is such a publication, it avoids the privilege, because it is communicated through unprivileged persons. As to the damages, I am not at all disposed to think them excessive. The charge against the plaintiff was of a very grave character. It was made with considerable severity, and it was insisted upon even down to the trial.

*Rule refused.*³

PULLMAN AND ANOTHER v. WALTER HILL & CO., LIMITED.

IN THE COURT OF APPEAL, DECEMBER 18, 19, 1890.

[Reported in (1891) 1 *Queen's Bench Reports*, 524.]

MOTION by the plaintiffs for a new trial.

At the trial before Day, J., with a jury, it appeared that the plaintiffs were members of a partnership firm of R. & J. Pullman, in which

¹ The statement of the case is abridged; the arguments of counsel and the concurring opinions of LORD COLERIDGE, C. J., and DENMAN, J., are omitted. — ED.

² *Robinson v. Jones*, L. R. 4 Ir. 391 *Accord.* — ED.

³ *Robinson v. Jones*, L. R. 4 Ir. 391 *Accord.* See also *Smith v. Crocker*, 5 T. L. R. 441; *Muetze v. Tuteur*, 77 Wis. 236. — ED.

there were three other partners. The place of business of the firm was No. 17, Greek Street, Soho. The plaintiffs were the owners of some property in the Borough Road, which they had contracted in 1887 to sell to Messrs. Day & Martin. The plaintiffs remained in possession of the property for some time, and agreed to let a hoarding, which was erected upon the property, at a rent to the defendants, who were advertising agents, for the display of advertisements. In 1889 a dispute arose between the plaintiffs and Day & Martin, who were building upon the land, as to which of the two were entitled to the rent of the hoarding; and on September 14, 1889, the defendants, after some prior correspondence, wrote the following letter:—

“ Messrs. Pullman & Co., 17, Greek Street, Soho.

“ *Re Boro' Road.*

“ Dear Sirs, — We must call your serious attention to this matter. The builders state distinctly that you had no right to this money whatever; consequently it has been obtained from us under false pretences. We await your reply by return of post.

“ Yours faithfully,

“ (Signed) Walter Hill & Co., Limited.”

This letter was dictated by the defendants' managing director to a short-hand clerk, who transcribed it by a type-writing machine. This type-written letter was then signed by the managing director, and, having been press-copied by an office-boy, was sent by post in an envelope addressed to Messrs. Pullman & Co., 17, Greek Street, Soho. The defendants did not know that there were any other partners in the firm besides the plaintiffs. The letter was opened by a clerk of the firm in the ordinary course of business, and was read by two other clerks. The plaintiffs brought this action for libel. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The learned judge held that there was no publication, that the occasion was privileged, and that there was no evidence of malice. He therefore nonsuited the plaintiffs.¹

Lockwood, Q. C., and Oswald, for the plaintiffs.

Murphy, Q. C., and R. M. Bray, for the defendants.

LORD ESHER, M. R. Two points were decided by the learned judge: (1) that there had been no publication of the letter which is alleged to be a libel; (2) that, if there had been publication, the occasion was privileged. The question whether the letter is or is not a libel is for the jury, if it is capable of being considered an imputation on the character of the plaintiffs. If there is a new trial, it will be open to the jury to consider whether there is a libel, and what the damages are. The learned judge withdrew the case from the jury.

The first question is, whether, assuming the letter to contain defam-

¹ The arguments of counsel and the concurring opinions of LOPES and KAY, L.JJ., are omitted. — Ed.

atory matter, there has been a publication of it. What is the meaning of "publication"? The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself. If there was no publication, the question whether the occasion was privileged does not arise. If a letter is not communicated to any one but the person to whom it is written, there is no publication of it. And, if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes away the letter and makes its contents known, I should say that would not be a publication. If the writer of a letter shows it to his own clerk in order that the clerk may copy it for him, is that a publication of the letter? Certainly it is showing it to a third person; the writer cannot say to the person to whom the letter is addressed, "I have shown it to you and to no one else." I cannot, therefore, feel any doubt that, if the writer of a letter shows it to any person other than the person to whom it is written, he publishes it. If he wishes not to publish it, he must, so far as he possibly can, keep it to himself, or he must send it himself straight to the person to whom it is written. There was, therefore, in this case a publication to the type-writer.

Then arises the question of privilege, and that is, whether the occasion on which the letter was published was a privileged occasion. An occasion is privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who receives it has an interest in hearing it. Both these conditions must exist in order that the occasion may be privileged. An ordinary instance of a privileged occasion is in the giving a character of a servant. It is not the legal duty of the master to give a character to the servant, but it is his moral duty to do so; and the person who receives the character has an interest in having it. Therefore, the occasion is privileged, because the one person has a duty and the other has an interest. The privilege exists as against the person who is libelled; it is not a question of privilege as between the person who makes and the person who receives the communication; the privilege is as against the person who is libelled. Can the communication of the libel by the defendants in the present case to the type-writer be brought within the rule of privilege as against the plaintiffs—the persons libelled? What interest had the type-writer in hearing or seeing the communication? Clearly, she had none. Therefore, the case does not fall within the rule.

Then again, as to the publication at the other end—I mean when the letter was delivered. The letter was not directed to the plaintiffs in their individual capacity; it was directed to a firm of which they were members. The senders of the letter no doubt believed that it would go to the plaintiffs; but it was directed to a firm. When the letter arrived it was opened by a clerk in the employment of the plain-

tiffs' firm, and was seen by three of the clerks in their office. If the letter had been directed to the plaintiffs in their private capacity, in all probability it would not have been opened by a clerk. But mercantile firms and large tradesmen generally depute some clerk to open business letters addressed to them. The sender of the letter had put it out of his own control, and he had directed it in such a manner that it might possibly be opened by a clerk of the firm to which it was addressed. I agree that under such circumstances there was a publication of the letter by the sender of it, and in this case also the occasion was not privileged for the same reasons as in the former case. There were, therefore, two publications of the letter, and neither of them was privileged. And, there being no privilege, no evidence of express malice was required; the publication of itself implied malice. I think the learned judge was misled. I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libellous matter on their behalf, they will be liable for his acts. He ought to write such a letter himself, and to copy it himself, and, if he copies it into a book, he ought to keep the book in his own custody.¹

I think there ought to be a new trial.

Order for new trial.

TOMPSON v. DASHWOOD.

IN THE QUEEN'S BENCH DIVISION, APRIL 30, 1883.

[Reported in 11 *Queen's Bench Division Reports*, 43.]

WATKIN WILLIAMS, J.² I am of opinion that this rule should be discharged. The position of the parties is this: At the trial, before Cave, J., at the Warwick Winter Assizes, 1883, the following facts were proved in evidence or admitted: The plaintiff was the managing director, with a salary, of the Birmingham Vinegar Brewery Company, Limited. The defendant was a director of the same company. On the 29th of November, 1882, the plaintiff and the defendant were about to make a journey to the Continent upon the business and at the expense of the company, and upon that day the defendant wrote two letters.

¹ *Gambrill v. Schooley*, 93 Md. 48 *Accord*. But the dictation of a defamatory letter by a lawyer to his clerk and the copying of it by another clerk in the regular course of serving his clients, although a publication, is, nevertheless, privileged. *Boxsius v. Goblet* [1894] 1 Q. B. 842. And the authority of *Pullman v. Hill* is greatly weakened by *Edmonson v. Birch*, [1907] 1 K. B. 371, which treats as privileged the dictation of a defamatory letter by a company through one of its officers to a stenographer. See to the same effect *Owen v. Ogilvie Co.* 32 N. Y. Ap. Div. 465. — ED.

² Only the opinions of the court are given. — ED.

One of them (being the alleged libel) was written to Colonel Wood, the chairman of the company, and began "Dear Colonel Wood," and after stating that the plaintiff intended to start for the Continent on the following night, suggested that the secretary's cash-book should be looked into, in order to see what sums the plaintiff had charged against the company for travelling and other expenses, and that these sums were excessive, the innuendo alleged being that some of the expenses so charged had never really been incurred. The defendant wrote the other letter about a different matter to the secretary of the company, who was the plaintiff's brother, and by a mistake the defendant put each letter into the envelope intended for the other, so that the letter written to Colonel Wood went to the plaintiff's brother, who read and made a copy of it, and handed the original over to the plaintiff. The action is founded upon the allegation that the defendant falsely and maliciously wrote and published of the plaintiff the letter set out in the statement of claim. The learned judge at the trial directed the jury that the occasion upon which, and circumstances under which, the letter was written made it privileged. It was therefore necessary that the plaintiff in order to succeed should prove not only that the words complained of in the letter were defamatory, in the sense of being injurious, but also that they were written with actual malice. The jury gave a verdict for the defendant, and this rule was obtained on the ground of misdirection. The law stands thus, if a man writes and publishes of another that which is defamatory and untrue the law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice; he need only prove the defamatory and untrue character of the statements of which he complains. But there are occasions on which the law regards the defendant as so placed and having such an interest with respect to the subject-matter of the libel that, upon principle founded on common sense, the legal implication of malice is removed. That is the doctrine of privilege. The question here is whether or not the defendant was so circumstanced with respect to the subject-matter of the letter that the *prima facie* implication of malice, which the law would otherwise make, was rebutted. It is admitted that the defendant stood in such a relation to Colonel Wood that in writing to him the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended for the plaintiff that, the defendant having carelessly put the letter in the wrong envelope, so that it reached the hands of a person with whom he had no such relation, the protection of privilege is destroyed, and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question,

though there have been cases to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege. I am of opinion that there was no misdirection.

MATHEW, J. I am of the same opinion. I come to the conclusion that the rule ought to be discharged for the reason that there was no evidence that the defendant had any malicious feeling in writing the letter and sending it to the plaintiff's brother. Nothing more than negligence was shown; the letter was written honestly to the chairman, and a mistake was made through the defendant's negligence. It is said that for the consequences of that negligence he is responsible. If that view be correct, on the same principle this action would lie if all that the defendant did was to leave the letter about so that another could read it. I may add that the evidence of negligence here was extremely slight, because any one looking at the first line of the letter would see that it had been put by mistake into the wrong envelope.

*Rule discharged.*¹

¹ "The only way to deal with that case [Tompson v. Dashwood] in my opinion is to say that we do not agree with it and that it was wrongly decided" per Lord Esher in *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54, 61. In this case the communication was not privileged, because made to one having no interest in it, although reasonably supposed to have an interest.

A defamatory statement true of A. but published concerning B., by mistake, will support an action by B. *Shepherd v. Whitaker*, L. R. 10 C. P. 502; *Taylor v. Hearst*, 107 Cal. 262; *Griebel v. Rochester Co.*, 60 Hun, 319. But see, *contra*, *Hanson v. Globe Co.*, *supra*, 412 (Holmes, Morton, and Barker, JJ., dissenting).

Compare *Brett v. Watson*, 20 W. R. 723; *Fox v. Broderick*, 14 Ir. C. L. R. 453, 459; *Lorbl v. Breidenbach*, 78 Wis. 49. — ED.

SECTION VIII.

Malice.

BROMAGE AND ANOTHER v. PROSSER.

IN THE KING'S BENCH, EASTER TERM, 1825.

[Reported in 4 Barnewall & Cresswell, 247.]

BAYLEY, J., now delivered the judgment of the court.¹ This was an action for slander. The plaintiffs were bankers at Monmouth, and the charge was, that in answer to a question from one Lewis Watkins, whether he, the defendant, had said that the plaintiff's bank had stopped, the defendant's answer was, "It was true, he had been told so." The evidence was, that Watkins met defendant and said, "I hear that you say the bank of Bromage and Sneed, at Monmouth, has stopped. Is it true?" Defendant said, "Yes, it is; I was told so." He added, "It was so reported at Crickhowell, and nobody would take their bills, and that he had come to town in consequence of it himself." Watkins said, "You had better take care what you say; you first brought the news to town, and told Mr. John Thomas of it." Defendant repeated, "I was told so." Defendant had been told, at Crickhowell, there was a run upon plaintiffs' bank, but not that it had stopped, or that nobody would take their bills, and what he said went greatly beyond what he had heard. The learned judge considered the words as proved, and he does not appear to have treated it as a case of privileged communication; but as the defendant did not appear to be actuated by any ill will against the plaintiffs, he told the jury that if they thought the words were not spoken *maliciously*, though they might unfortunately have produced injury to the plaintiffs, the defendant ought to have their verdict; but if they thought them spoken *maliciously*, they should find for the plaintiff: and the jury having found for the defendant, the question upon a motion for a new trial was upon the propriety of this direction. If in an ordinary case of slander, (not a case of privileged communication), want of malice is a question of fact for the consideration of a jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury: and it appears to us that the direction in this case was wrong. That *malice*, in some sense, is the gist of the action, and that therefore the *manner and occasion of speaking the words* is admissible in evidence to show they were not spoken *with malice*, is said to have been agreed (either by all the judges, or at least by the four who thought the

¹ Only the opinion of the court is given. — Ed.

truth might be given in evidence on the general issue), in *Smith v. Richardson*; ¹ and it is laid down in 1 Com. Dig. action upon the case for defamation, G 5, that the declaration must show a *malicious intent* in the defendant, and there are some other very useful elementary books in which it is said that malice is the gist of the action, but in what sense the words *malice* or *malicious intent* are here to be understood, whether in the *popular* sense, or in the sense the law puts upon those expressions, none of these authorities state. Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it *of malice*, because I do it *intentionally* and without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery, without knowing the owner, I do it *of malice*, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and wilfully stand mute, I am said to do it *of malice*, because it is intentional and without just cause or excuse.² And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury, whether I meant to produce an injury or not, and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces? And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. This is so laid down in *Style*, 392, and was adjudged upon error in *Mercer v. Sparks*.³ The objection there was, that the words were not charged to have been spoken maliciously, but the court answered, that the words were themselves malicious and slanderous, and, therefore, the judgment was affirmed. But in actions for such slander as is *prima facie* excusable on account of the cause of speaking or writing it, as in the case of servant's characters, confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved by the plaintiff, and in *Edmonson v. Stevenson*,⁴ Lord Mansfield takes the distinction between these and ordinary actions of slander. In *Weatherstone v. Hawkins*,⁵ where a master who had given a servant a character, which prevented his being hired, gave his brother-in-law, who applied to him upon the subject, a detail by letter of certain instances in which the servant had defrauded him; Wood, who argued for the plaintiff, insisted that this case did not differ from the case of common libels, that it had the two essential ingredients, slander and falsehood; that it was not necessary to prove express malice; if the matter is slanderous, malice is implied, it is

¹ Willes, 24.² Russell on Crimes, 614, N. 1.³ Owen, 51; Noy, 35.⁴ Bull. N. P. 8.⁵ 1 Term Rep. 110.

sufficient to prove publication; the motives of the party publishing are never gone into, and that the same doctrine held in actions for words, no express malice need be proved. Lord Mansfield said the general rules are laid down as Mr. Wood has stated, but to every libel there may be an implied justification from the occasion. So as to the words, instead of the plaintiff's showing it to be false and malicious, it appears to be incidental to the application by the intended master for the character; and Buller, J., said, this is an exception to the general rule, on account of the occasion of writing. In actions of this kind, the plaintiff must prove the words "malicious" as well as *false*. Buller, J., repeats in *Pasley v. Freeman*,¹ that for words spoken confidentially upon advice asked, no action lies, unless express malice can be proved. So in *Hargrave v. Le Breton*,² Lord Mansfield states that no action can be maintained against a master for the character he gives a servant, unless there are extraordinary circumstances of express malice. But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice. Numberless occasions must have occurred (particularly in cases where a defendant only repeated what he had heard before, but without naming the author), upon which, if that were a tenable ground, verdicts would have been sought for and obtained, and the absence of any such instance is a proof of what has been the general and universal opinion upon the point. Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question, whether the defendant understood Watkins as asking for information for his own guidance, and that the defendant spoke what he did to Watkins, merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a *second* question to the jury, if their minds were in favor of the defendant upon the first; but as the previous question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. It was, however, pressed upon us with considerable force, that we ought not to grant a new trial, on the ground that the evidence did not support any of the counts in the declaration, but upon carefully attending to the declaration and the evidence, we think we are not warranted in saying that there was no evidence to go to the jury to support the declaration; and had the learned judge intimated an opinion that there was no such evidence, the plaintiff might have attempted to supply the defect. We, therefore, think that we cannot properly refuse a new trial, upon the ground that the result upon the trial might have been doubtful. In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact

¹ 3 T. R. 61.² 3 Burr. 2425.

for the consideration of the jury; for if the jury should think that when Watkins asked his question the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communication, and the question of malice, in fact, will then be a necessary part of the jury's inquiry; [but it does not appear that it was left to the jury in this case, to consider whether this was understood by the defendant as an application to him for advice, and if not, the question of malice was improperly left to their consideration.] We are, therefore, of opinion, that the rule for a new trial must be absolute. *Rule absolute.*

JACKSON v. HOPPERTON.

IN THE COMMON PLEAS, MAY 25, 1864.

[Reported in 12 Weekly Reporter, 913.]

THIS case was tried before Williams, J., at Guildhall, in the sittings after last Easter Term.

The declaration stated that, "before the speaking, &c., the defendant had been a man-milliner, and the plaintiff had been in his service and employ as a saleswoman and assistant, and the defendant falsely, &c., spoke, &c., of the plaintiff the words 'Miss Jackson' (thereby meaning the plaintiff) 'is dishonest,' thereby meaning that the plaintiff was a thief and a dishonest servant, and had been guilty of fraudulent conduct in her capacity as such saleswoman, &c., whereby, &c., the plaintiff was injured in credit and reputation, and certain persons trading under the name and style of 'Capper, Son, & Co.' refused to employ the plaintiff as saleswoman and servant in their employ, as they otherwise would have done, and the plaintiff lost and was deprived of her said situation in the employ of the said 'Capper, Son, & Co.,' and has been for a long space of time unable to obtain employment, &c."

Plea — Not guilty.

The plaintiff entered the defendant's service on December 1st, 1862, and remained in his employ till October, 1863, when she left, he having accused her of taking some money, and a few other things. Shortly after she left, she returned for her boxes, and asked him for her wages, and he then accused her of taking £3 10s., but said, "if you had come back, I should have said nothing about it." A few days after he paid her her wages. Two or three days after this, she applied to the Messrs. Capper, Son, & Co. for a situation; and she informed the defendant that a young lady was coming to him for a reference, and he then said, "I will give you no reference, but if you own that you took the money I will give you a reference." The lady from Messrs. Capper, Son, &

Co. called at the defendant's and asked him for the plaintiff's character, when he spoke the words in the declaration, and said he would not give her a character, she was dishonest, and that he had money and goods which he could prove she had taken. The plaintiff did not get the situation, the wages for which were £50 a year and board. The jury found a verdict for the plaintiff for £60.

Mr. Chambers, Q. C. (*Hance* with him), now moved for a rule calling on the plaintiff to show cause why this verdict should not be set aside, and instead thereof a nonsuit entered, on the ground that there was no evidence of express malice; or for a new trial, on the grounds that the verdict was against the evidence, and that the damages were excessive.

ERLE, C. J. I am of opinion that there should be no rule in this case. This was an action for defamation of character, and evidence was adduced on the part of the defendant to show that the defamatory words were uttered on an occasion which justified the use of them. The question left to the jury was, whether the defendant believed the imputation of dishonesty, which he made against the plaintiff, was true or not, and they found he did not believe it to be so, and the judge is satisfied with their answer. I think this was a necessary question to be left to them. Then, as to the damages being excessive, the plaintiff lost a situation for which she would have received £50 a year, and it cannot be said that £60 is too large a sum as compensation for that loss. *Mr. Chambers* also moved on the ground that it was the judge's duty to nonsuit the plaintiff at the close of the plaintiff's case; but she tried to get another situation, and a lady called on the defendant for her character, and he then spoke to the lady the words complained of; where words are spoken on such an occasion as that, if the person uttering them believe them to be true, and there be no further evidence to show a probability that they were spoken maliciously, it is the duty of the judge to nonsuit the plaintiff. The cases of *Taylor v. Hawkins*¹ and *Somerville v. Hawkins* show what is the law under such circumstances, and lay down that, if the plaintiff give evidence from which the jury might infer malice, such as, that the defendant made the imputations not believing them to be true, or that at the time when he spoke the words he did not believe he was in the discharge of a duty, the question of malice ought to be left to the jury; and it appears from the old cases, and also the two cases above cited, that defamation carries with it a presumption of malice, and that it is *prima facie* evidence of malice, but the occasion on which the defamatory words are spoken may rebut the *prima facie* inference of malice, and then additional evidence may be given to show that there was malice, and the jury are to find on that evidence and on the libel itself whether there be malice. In the case of *Wright v. Woodgate*,² it is thus laid down by Parke, B., at p. 577: "The proper meaning of a privileged communication is only

¹ 16 Q. B. 308.

² 2 C. M. & R. 573.

this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice; in fact, that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. In the present case, it became, in my opinion, incumbent upon the plaintiff to show malice in fact. This he might have made out, either from the language of the letter itself, or by extrinsic evidence, as by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill-will." And in *Taylor v. Hawkins*, Lord Campbell lays it down at p. 321 thus: "The rule is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice." I think that the fact of his charging her with stealing the £3 10s., and, not making that charge till after she had threatened to leave, and then the fact of his telling her that if she had come back he should have said nothing about it, and that if she owned she took it he would give her a reference, were sufficient facts to justify the jury in inferring that he was not performing the important duty between man and man, of stating what he believed to be the plaintiff's true character, when he spoke the words which are the subject of this action.

WILLIAMS, WILLES, and BYLES, JJ., concurred.

*Rule refused.*¹

SOMERVILLE v. HAWKINS.

IN THE COMMON PLEAS, HILARY TERM, 1851.

[Reported in 10 *Common Bench*, 583.]

THIS was an action upon the case for slander.

The defendant pleaded not guilty.

The cause was tried before Wilde, C. J., at the sittings in London after Hilary term, 1848. It appeared, that the plaintiff had been in the service of the defendant, and had been dismissed on a Thursday, in consequence of some articles being missed, which he was suspected of having stolen; and that, when he went to the defendant's shop on the following Saturday to receive the wages due to him, the defendant called Jones and Williams, the other two servants, into the counting-house, and, speaking of the plaintiff, said to them — "I have dismissed that man for robbing me: do not speak to him any more, in public or in private, or I shall think you as bad as him."

For the defendant, it was submitted that this was a privileged communication.

¹ *Nevill v. Fine Arts Co.* [1895] 2 Q. B. 156; *Hollenbeck v. Ristine*, 105 Iowa, 488; *Atwill v. Mackintosh*, 120 Mass. 177; *Wagner v. Scott*, 164 Mo. 289; *McGow v. Hamilton*, 184 Pa. 108; *Hellstern v. Katzer*, 103 Wis. 391 *Accord.* — Ed.

On the other hand, it was insisted, that the act complained of was perfectly gratuitous, not like a communication made to a confidential person, or a matter that the other servants had any interest in; and that it was a question for the jury, whether the statement was made under circumstances which indicated malice.

The Lord Chief Justice was of opinion that this was a privileged communication, and that there was no evidence of malice, and thereupon directed a nonsuit to be entered.¹

E. James, in the following Easter term, obtained a rule *nisi* for a new trial, on the ground of misdirection.²

Byles, Serjt., in Trinity term, 1849, showed cause.

MAULE, J., now delivered the judgment of the court.³

This was an action for words imputing theft, spoken by the defendant of the plaintiff. The defendant pleaded not guilty, and a justification.

At the trial, before Wilde, C. J., it appeared that the plaintiff had been in the service of the defendant, and had been dismissed on a charge of theft; that he afterwards came to the defendant's house, and had some communication with the defendant's servants; and that the words in question, — "I have dismissed that man for robbing me; do not speak to him any more, in public or in private, or I shall think you as bad as him," — were spoken by the defendant to his servants.

The Lord Chief Justice was of opinion that this was a privileged communication; and that there was no evidence of malice; and that the verdict must be found for the defendant on the general issue: but he offered to go on and try the issue on the justification. This the plaintiff declined; and thereupon the Lord Chief Justice directed a nonsuit to be entered.

The plaintiff obtained a rule *nisi* for a new trial, on the ground of misdirection.

It was contended for the plaintiff, upon the argument on showing cause, that the Lord Chief Justice was mistaken in both respects, *i. e.*, that the communication was not privileged, and that there was evidence of malice.

But we think that the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge, — a supposition

¹ The statement of the case is abridged, and the arguments of counsel are omitted.
— ED.

² 2 C. M. & R. 578.

³ The case was argued in Trinity term, 1849, before WILDE, C. J., COLTMAN, J., MAULE, J., and CRESSWELL, J.

always to be made when the question is whether a communication be privileged or not,—it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself.

We think, therefore, the communication in question was privileged, *i. e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to show affirmatively that the words were spoken maliciously; for, the question, being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favor of the defendant.

On considering the evidence in this case, we cannot see that the jury would have been justified in finding that the defendant acted maliciously. It is true that the facts proved are *consistent* with the presence of malice, as well as with its absence. But this is not sufficient to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent with malice is shown in evidence: so that, to say, that, in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved,—which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given.

It is certainly not necessary, in order to enable a plaintiff to have the question of malice submitted to the jury, that the evidence should be such as necessarily leads to the conclusion that malice existed, or that it should be inconsistent with the non-existence of malice; but it is necessary that the evidence should raise a probability of malice, and be more consistent with its existence than with its non-existence.

In the present case, the evidence, as it appears to us, does not raise any probability of malice; and is quite as consistent with its absence as with its presence: and considering, as we have before observed, that the mere possibility of malice which is found in this case, and in all cases where it is not disproved, would not be sufficient to justify a jury in finding for the plaintiff, we think the Lord Chief Justice was right in not leaving the question to them, and consequently that this rule must be discharged.

Rule discharged.

JENOURE, DEFENDANT, AND DELMEGE, PLAINTIFF.

IN THE PRIVY COUNCIL, DECEMBER 19, 1890.

[*Reported in Law Reports (1891), Appeal Cases, 73.*]

LORD MACNAGHTEN.¹ This was an action of libel brought by the respondent Louis Edward Delmege against the appellant Frederick Alfred Jenoure.

The respondent is a government medical officer in the parish of Portland. The appellant is a pen-keeper residing in the same parish, and a justice of the peace.

The libel complained of was contained in the following letter addressed by the appellant to the inspector of constabulary for the district.

“ Boston, Priestman River,
14th January, 1888.

“ Sir, — I have been informed on good authority that Dr. Delmege, of Manchioneal, was called by one Lindsay (who, I believe, is his servant) to attend a woman in labor named Zipporah Henry, of Manchioneal, on Sunday, 8th January; that, although implored by Lindsay to attend the woman, the doctor refused to do so without the fee, and that consequently the woman died on Monday morning from want of medical attendance. I shall be obliged, in the interest of humanity, especially as I am informed it is by no means an uncommon occurrence for Doctor Delmege to refuse to attend such cases, if you will inquire into this matter, and if the facts prove to be as stated, that you will report the case to the proper authority, as such wilful neglect cannot be allowed.

“ I am, Sir,

“ Your obedient servant,

“ F. A. JENOURE, J. P.

“ R. L. Rivett, Esq.,

“ Inspector of Constabulary,

“ Port Antonio.”

The appellant pleaded that the statements contained in the letter were true in substance and in fact, and that the occasion of the publication was privileged.

The action was tried before Sir Adam Gib Ellis, C. J., and a special jury. In the result the jury returned a general verdict for the respondent with £50 damages, and judgment was entered accordingly.

The appellant moved for a new trial. The motion was made on several grounds. But on the 26th of July, 1888, a rule was granted, only on the ground of misdirection with regard to the question of privilege.

The rule came on for argument before Ellis, C. J., and Curran and

¹ Only the opinion of the court, and that, too, slightly abridged, is given. — ED.

Northcote, JJ. On the 5th of September, 1888, the court unanimously discharged the rule and confirmed the judgment.

The appellant subsequently applied for and obtained special leave from her Majesty in council to prefer an appeal.

Their Lordships have not the advantage of seeing a note of the summing-up. But the substance of it, so far as material on the question of misdirection, is stated very clearly in the judgment of the Chief Justice upon the application to make the rule absolute.

The Chief Justice told the jury that it was the duty of the appellant, as a justice of the peace, to bring circumstances such as those mentioned in his letter to the notice of the proper authorities. Their Lordships may observe in passing that, in their opinion, nothing turns on the position of the appellant as justice of the peace. To protect those who are not able to protect themselves is a duty which every one owes to society. The Chief Justice went on to tell the jury that the proper authority to whom such a complaint should have been submitted was the superintending medical officer; but he also told them that, if they thought that the appellant had addressed the letter to the inspector of constabulary by an honest unintentional mistake as to the proper authority to deal with the complaint, then the communication would not be deprived of any privilege to which it would have been entitled had it been addressed to the superintending medical officer. So far the summing-up seems to be open to no objection. The Chief Justice then proceeded to explain to the jury that the existence of privilege was contingent on whether, in their opinion, the appellant honestly believed the statements contained in the letter to be true. The meaning of the Chief Justice is made perfectly clear by what follows. After referring to cases where the alleged defamatory matter was spoken or written by masters with reference to the characters of servants, he points out that, in such cases, "no question as to the *bona fides* of the defendant arises as preliminary to the existence of privilege." Where, however, "it is alleged that the defamatory communication was made in discharge of a duty," his view was that the defendant must "satisfy the jury that he made the communication with a belief in its truth." "No doubt," he adds, "the *dicta* of some of the judges in the masters and servants cases cited seem to extend to all classes of privileged communications; but no case was cited, and I have been able to find none, where, when privilege was claimed on the ground that the communication was made in the discharge of a duty, it has been held that the plaintiff, to support his action, must prove express malice. . . . In the one case, there can be no room for doubt that, if the defendant establish the relation which existed between him and the plaintiff, a privilege arises which can only be overcome by proof of express malice. In the other, the authorities already cited show that, where a defendant claims privilege in respect of a charge of misconduct volunteered by him, he must satisfy the jury that he acted *bona fide* before the question of privilege arises for the determination of the judge."

There can be no doubt, therefore, that the learned Chief Justice gave the jury to understand that it lay upon the appellant to prove affirmatively that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice.

Curran, J., took the same view of the authorities, and Northcote, J., concurred.

Notwithstanding some *dicta* which, taken by themselves and apart from the special circumstances of the cases in which they are to be found, may seem to support the view of the Chief Justice, their Lordships are of opinion that no distinction can be drawn between one class of privileged communications and another, and that precisely the same considerations apply to all cases of qualified privilege. "The proper meaning of a privileged communication," as Parke, B., observes, — *Wright v. Woodgate*,¹ — "is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." There is no reason why any greater protection should be given to a communication made in answer to an inquiry with reference to a servant's character than to any other communication made from a sense of duty, legal, moral, or social. The privilege would be worth very little if a person making a communication on a privileged occasion were to be required, in the first place, and as a condition of immunity, to prove affirmatively that he honestly believed the statement to be true. In such a case *bona fides* is always to be presumed.

Their Lordships consider the law so well settled that it is not in their opinion necessary to review the authorities cited by the Chief Justice. The last case on the subject is *Clark v. Molyneux*, to which, unfortunately, the attention of the Supreme Court was not called. That was a case, not of master and servant, but of a communication volunteered from a sense of duty. A verdict was found for the plaintiff. But it was set aside by the Court of Appeal on the ground of misdirection. In giving his judgment, Cotton, L. J., used the following language, every word of which is applicable to the present case. "The burden of proof," he said, "lay upon the plaintiff to show that the defendant was actuated by malice; but the learned judge told the jury that the defendant might defend himself by the fact that these communications were privileged, but that the defendant must satisfy the jury that what he did he did *bona fide*, and in the honest belief that he was making statements which were true. It is clear that it was not for the defendant to prove that he was acting from a sense of duty, but for the

¹ 2 C. M. & R. 577.

plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."¹

Their Lordships are therefore of opinion that there was a misdirection on a material point, which may have led to a miscarriage. Indeed, it is difficult to see how the jury could have done anything but find for the plaintiff, having regard to the way in which the question was presented to them. The jury were told that it was for the defendant to prove that he honestly believed the statements in his letter to be true; whereas the letter itself put those statements forward, not as matters of the truth of which the writer had satisfied himself, but as matters calling for inquiry and consideration by the proper authorities.

Their Lordships think that the verdict cannot stand, and that there ought to be a new trial.

CLARK v. MOLYNEUX.

IN THE COURT OF APPEAL, DECEMBER 4, 1877.

[Reported in 47 *Law Journal Reports*, *Common Law*, 230.*]

THE action was for slander and libel. The plaintiff, a clergyman of the Church of England, had been formerly in the army, but left it in the year 1863; and, after taking his degree at Cambridge, was ordained by the Bishop of Exeter, and subsequently became curate at Assington, to the Rev. H. L. Maud.

In March, 1876, the defendant, the Rev. Canon Molyneux, the Rector of Sudbury, which is in the neighborhood of Assington, when calling on a Mr. G. Bevan, a banker, with whom he had been intimate for twenty-four years, was informed by Mr. Bevan that the plaintiff was going to preach one of a course of Lenten sermons at Newton Church, in the neighborhood, and that he was sure that if Mr. Charles Smith, the rector, knew what sort of a person the plaintiff was, he would never permit him to preach in his church. Mr. Bevan then desired the defendant, as an old friend of Mr. Smith's, to let him know what the plaintiff's character was. In answer to the defendant's inquiry as to what was the nature of the charges against the plaintiff, Mr. Bevan said that he had been obliged to leave the army through cheating with cards, had lived an irregular life at Cambridge, had been guilty of gross immorality when curate at Horringer, and had boasted of it. The defendant, placing implicit reliance on Mr. Bevan, and thinking that it was his duty to acquaint Mr. Charles Smith with the matter, at once rode to his house, and, finding that he was ill in bed, communicated his information to the Rev. H. Smith, his son, who was in the house.

At the end of the same month the defendant consulted the Rev. J. C.

¹ *Locke v. Road Trust Co.*, 22 Fed. 771; *Hemmens v. Nelson*, 138 N.Y. 524; *Haft v. New Castle Bank*, 19 N. Y. Ap. Div. 425; *Strode v. Clement*, 90 Va. 553 *Accord.* — Ed.

² 3 Q. B. Div. 237, s. c.

Martyn, his rural dean, as to whether he should not speak to Mr. Maud, the plaintiff's rector. Mr. Martyn said he thought the defendant ought to do so. As Mr. Maud was abroad, the defendant spoke to his solicitor on the subject; and on Mr. Maud's return he received a letter from him, asking for information. The defendant wrote an answer detailing the facts substantially as communicated to him by Mr. Bevan; but some of the expressions in the letter were stronger than those used by Mr. Bevan. "Profligate" was used instead of "irregular," and "expelled the army," instead of "obliged to leave the army."

The defendant also consulted Mr. Green, his curate, who was announced to preach one of the same course of sermons as the plaintiff. Mr. Green had been with the plaintiff for twenty years, and was consulted by him on every ecclesiastical matter that came before him.

The communications made to Mr. Green, Mr. H. Smith and Mr. Martyn were the slanders complained of, and the letter to Mr. Maud was the libel.

The defendant relied solely on the privilege of the occasions and the *bona fides* of his statements.

The action was tried before Baron Huddleston and a special jury at Bury St. Edmunds, at the Summer Assizes, 1876.

The learned judge ruled that all the occasions were privileged, and the case went to the jury on the question of express malice.

In the course of his summing up the learned judge said: "Now in law if a man says what is not true, or writes what is libellous, or says what is slanderous of another, it is presumed that it is malicious. But where the occasion is privileged, then you require something more, and you require what the law calls express malice. I must tell you what express malice means."

And again, at the close of the summing up:—

"What you have to consider, then, is really and substantially this—assuming that these occasions were privileged, do you think that the defendant made those statements and wrote that letter *bona fide*, and in the honest belief that they were true—not merely that he believed them himself, but honestly believed them, which means that he had good grounds for believing them to be true. I do not mean to say pig-headedly, pertinaciously and obstinately perhaps persuaded himself of the matter for which he had no reasonable grounds, and of which you twelve gentlemen would say they were perfectly unjustified. If you think that under these circumstances Mr. Molyneux has taken himself out of the privilege in consequence of the statements not being made *bona fide* and in the honest belief they were true, and that therefore there is what in law is called malice in fact, which I have explained to you, then your verdict will be for the plaintiff."¹

The jury found a verdict for the plaintiff, with £200 damages.

¹ The charge of the learned baron is abridged; the arguments of counsel and the concurring opinions of BRAMWELL and COTTON, L.JJ., are omitted. — ED.

These passages and the general tenor of the summing up, which was to the same effect, constituted the misdirection complained of.

The defendant moved for a new trial in the Queen's Bench Division, on the ground of misdirection, and that the verdict was against evidence; but the court refused the rule. The defendant appealed.

BRETT, L. J. I am of the same opinion; I think that there was, what amounts in law to a misdirection; that the verdict was against the evidence; and, further, that there was no evidence to go to the jury.

With regard to the alleged misdirection, I do not think that we differ from the Queen's Bench Division in our view of the law, but I think that, whatever the idea Baron Huddleston intended to convey to the jury in his careful, elaborate, and, if I may say so, able summing up, really was, it may have materially misled them, and if it may, that is in law a misdirection.

The summing up is founded on the assumption that the occasions of the alleged slanders and libel were privileged, and that the defendant was therefore excused in that which would otherwise have been actionable, if he used the occasions fairly. Now it is right before criticising the summing up of the learned judge to state, as clearly as one can, what the law relating to excuse by reason of privilege in cases of libel and slander really is. It is, I apprehend, this: When a defendant claims that the occasion of a libel or slander is privileged, and when it is held by the judge, whose duty it is to decide the matter, that the occasion is privileged, the question arises, — under what conditions can the defendant take advantage of the privilege? If the occasion is privileged, it is so for some reason, and the defendant is entitled to the protection of the privilege if he uses the occasion for that reason, but not otherwise. If he uses the occasion for an indirect reason or motive, he uses it, not for the reason which makes it privileged, but for another. One, but by no means the only, indirect motive which can be alleged, is the gratification of some anger or malice of his own. By malice here I mean, not a pleading expression, but actual malice, or what is termed malice in fact, *i. e.*, a wrong feeling in the defendant's mind. If this malice be the indirect and wrong motive suggested in a particular case, there are certain tests by which its existence may be investigated. Two such tests are these: If a man is proved to have stated what he knew to be false, no one inquires further, everybody assumes thenceforth that he was malicious, that he did so wrong a thing from some wrong motive. Again, if it be proved that out of anger or from some other wrong motive the defendant has stated something as a truth or as true, without knowing or inquiring whether it was true or not, therefore reckless, by reason of his anger or other motive, whether it is true or not, the jury may infer, and generally will infer, that he used the occasion for the gratification of his anger or malice, or other indirect motive, and not for the reason or motive which occasions or justifies the privilege.

These tests have been suggested before, and they were approved by the whole Court of Common Pleas in a case tried before me at Leeds, and I apprehend they are correct.

That being so, I think that Baron Huddleston did not follow these rules and tests, but others. Take his summing up as a whole, as I think we ought, he left the case as if the burden of proving there was no malice lay on the defendant, but if the occasion be privileged, the *onus* of showing malice is at once thrown on the plaintiff. Further, in order to guide the jury as to what malice was, he read the passage in *Bromage v. Prosser*; what he read there is not a definition of malice, in fact, at all, but of that malice which is a technical term in certain pleadings, where it simply means "wilfully." It has been held, that in such pleadings the absence of the word maliciously is immaterial if the word wilfully is present — because they are in such pleadings synonymous terms. Then, I think the passage at the end of the summing up is really a recapitulation of the sense of the whole summing up, and might lead the jury to believe that, although they were of opinion that the defendant did believe what he stated, he would not be protected unless his belief was a reasonable one, as distinguished from a pig-headed, obstinate, and insensible one. But the real question, as I have stated, is, whether the defendant did, in fact, believe his statement, or whether being angry or moved by some other indirect motive, did not know, and did not care, whether his statement was true or false. Questions of pig-headedness and obstinacy may be tests as to whether a man really did honestly believe or not, but Baron Huddleston left them as if they were of the essence of the definition of malice.

The direction was therefore wrong if the occasions were privileged. That they were I have a very strong opinion. The only occasion disputed is that of the communication to Mr. Green the curate. I am clearly of opinion that that was privileged. I think that where a clergyman consults his curate as to his conduct in an ecclesiastical matter, the occasion is a privileged one.

As to the other points, I think that at least the verdict was against the evidence. But I think more, I think there was no evidence fit to be submitted to a jury, and, therefore, if on a new trial the facts remain the same, the judge's duty will be to direct the jury that there is no case. In this matter, therefore, there has been a miscarriage. But I think that the case is not one in which to apply Order XL., rule 10, and enter the verdict for the defendant, as it does not follow that on a new trial further evidence may not be forthcoming.

Appeal allowed.

¹ *Barry v. McCollom*, (Conn. 1908) 70 Atl. R. 1034; *Bays v. Hunt*, 60 Iowa, 251, 255-6; *Hemmens v. Nelson*, 138 N. Y. 517; *Haft v. First Bank*, 19 N. Y. Ap. Div. 423 *Accord.* — Ed.

CARPENTER v. BAILEY.

IN THE SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1873.

[Reported in 53 *New Hampshire Reports*, 590.]

THIS is an action on the case for a libel, by J. N. Carpenter against J. H. Bailey, the writ bearing date September 21, 1869.¹ The declaration alleges, that, on April 20, 1869, the plaintiff was a paymaster in the navy, stationed as purchasing agent at Portsmouth; that, by the rules of the navy department, he was entitled to remain on that station three years; and that the defendant, contriving, &c., published of him the following libel: "To the Honorable the Senators and Members of the House of Representatives in Congress from New Hampshire: The undersigned, after much patience has been exhausted, beg to remonstrate against the further continuance at this station of Paymaster J. N. Carpenter as purchasing agent. In all our struggles, Paymaster Carpenter has always voted against us, carrying the straight Democratic ticket, throwing his patronage adversely to the friends of General Grant, and always filling the requirements of a tool sent here by ex-Secretary Welles to carry out the interests of Andrew Johnson. May we hope for relief from such a burden? Let the rebel sympathizer be exchanged for a man who will have office hours of a convenient kind, and will be found there *at least once a day* to attend to those having business there, and officers and citizens will alike be grateful. Portsmouth, N. H., April 20, 1869. E. G. Peirce, Jr., Chas. Robinson, Aaron Young, Daniel J. Vaughan, E. A. Stevens, W. H. Hackett, John H. Bailey, Paine Durkee."

"The defendant pleaded in substance that he was informed and believed that the plaintiff had done the things charged in the petition and that he believed that the public good, and the welfare of said administration of General Grant, required that the said plaintiff should be removed from said office at said station, and that a suitable officer should be put there in his stead, and that the senators and members of the House of Representatives in Congress from the State of New Hampshire were the proper persons and officers to be petitioned in order to procure the removal of the said plaintiff from said office at said naval station, the defendant, in good faith, and without malice or ill-will to the said plaintiff, but in order to procure the removal of the plaintiff for the causes aforesaid from the said office, signed said petition to said senators and representatives containing said supposed libellous words in the plaintiff's declaration mentioned, as he lawfully might have done, for the cause aforesaid, and this he is ready to verify." Wherefore, &c.

To this plea the plaintiff demurred generally.

¹ The case is materially abridged. — Ed.

SARGENT, C. J. If the defendant cannot justify by showing the truth of the matter charged, he may excuse the publication by showing that it was made upon a lawful occasion, upon probable cause, and from good motives.

It is also said that matter in excuse in a prosecution for libel is where the defendant, upon a lawful occasion, proceeded with good motives upon probable grounds, — that is, upon reasons that were apparently good, but upon a supposition which turns out to be unfounded. This is a very different thing from showing the actual truth of the allegations: where that is proved with a proper occasion, it is a justification without regard to motives; but where the statements made prove false, the defendant needs to show not only a proper occasion, but a good motive also, — for, if the matter be untrue and the motive bad, how could the end be justified or even excused? But when the occasion is proper, one may be excused for stating what proves to be untrue, if he had probable cause to believe it true, and spoke it from good motives; see authorities, 9 N. H. 45.

So, in *Palmer v. Concord*,¹ it is said, by Smith, J., that most of what are called “privileged communications” are conditionally, not absolutely, privileged. The question is one of good faith, or motive, and can be settled only by a jury. A court cannot rule that a communication is privileged, without assuming the conditions on which it is held to be privileged, namely, that it was made in good faith, for a justifiable purpose, and with a belief, founded on reasonable grounds, of its truth; — and see cases cited.

In the case before us, the occasion would be a lawful one, provided the motive was good, and there was probable cause. And the question is, whether the mere fact, that the defendant had been informed and believed that a fact was so, is equivalent to having probable cause to believe it to be so. And we think it could not be assumed that it was so. A person might be informed of a fact by one in whom he might, for some special reason, have confidence, but to whom no one else would give the slightest credence; and a jury would readily find that a belief in that case was founded upon information which would not amount to probable cause for the belief of any man of ordinary capacity. The question for the jury would be, not whether the defendant believed it, but had he probable cause to believe it? There might be belief without probable cause for it; and hence it would not be sufficient to allege merely information and belief, because that might not, in a given case, amount to probable cause. The fourth plea is substantially correct in form, and goes as far as the rule thus laid down will warrant; and we think this third plea is insufficient. *Demurrer sustained.*²

¹ 48 N. H. 217.

² *Ranson v. West*, 125 Ky. 457 (*semble*); *Toothaker v. Conant*, 91 Me. 438; *Briggs v. Garrett*, 111 Pa. 304; *Conroy v. Pittsburgh Times*, 139 Pa. 334; *Muldenig v. Wilkes Barre Times*, 215 Pa. 470.

See, also, *Douglass v. Daisley*, 114 Fed. 628 *Accord.* — Ed.

CHAPTER IV.

MALICIOUS PROSECUTION.

SECTION I.

Malicious Prosecution of Criminal Proceedings.

(a) INSTITUTION OF CRIMINAL PROCEEDINGS.

REACH v. QUINN.

SUPREME COURT, ALABAMA, JANUARY 19, 1909.

[48 *Southern Reporter*, 540.]

DOWDELL, J.¹ The fifth count, whether intended as a count in case for a malicious prosecution or as a count in trespass for false imprisonment, was in either aspect faulty, and subject to the demurrer interposed. As a count in case for malicious prosecution, it is faulty omitting to aver the issuance of process.² *Davis v. Sanders*,³ and authorities there cited. As a count in trespass for false imprisonment, it fails to aver that the defendant arrested and imprisoned, or caused to be arrested or imprisoned, the plaintiff. Manifestly it was intended by the pleader as a count in case for malicious prosecution, since it contains all of the necessary averments of such a complaint (form 20, Code 1896, p. 947, c. 91), except the averment of the issuance of the warrant.

Affirmed.

¹ Only a portion of the opinion is given. — Ed.

² *Cooper v. Armour*, 49 Fed. 215; *Davis v. Sanders*, 133 Ala. 275 *Accord*.
Clarke v. Postan, 6 C. & P. 423; *Dawson v. Vansanden*, 11 W. R. 516; *Coffey v. Myers*, 84 Ind. 105 *Contra*.

The count in malicious prosecution must allege the charges of the defendant upon which the warrant was issued. *Hughes v. Ross*, 1 St. & P. 258, 261; *Long v. Rogers*, 17 Ala. 540; *Adams v. Lisher*, 3 Blackf. 241, 245; *Galloway v. Stewart*, 49 Ind. 156, 159; *Barry v. Salt Co.*, 14 Phila. 124. — Ed.

³ 133 Ala. 275, 32 South. 499.

S. E. HALBERSTADT, APPELLANT, v. NEW YORK LIFE
INSURANCE CO.

COURT OF APPEALS, JANUARY 5, 1909.

[194 *New York Reports*, 1.]

THE action is brought to recover damages for an alleged malicious prosecution claimed to have been instituted by the respondent against the appellant in Mexico. It is in the complaint, amongst other things, alleged that the respondent through its agent in the Criminal Court of the city of Mexico charged the appellant with the crime of embezzlement "and thereupon and in and by virtue of said charge and the institution of said criminal proceedings a warrant was issued by said court for the arrest of the plaintiff (in this action)," and that thereafter "the said criminal proceedings for the punishment of said plaintiff were dismissed and extinguished and the said prosecution was thereby wholly determined . . . in favor of the plaintiff."

The respondent, by its second defence, which is challenged here for insufficiency, alleged, in substance, that before the warrant referred to in the complaint could be served upon the appellant and before he could be apprehended, "he left the Republic of Mexico and thereafter continuously remained absent . . . and by such absence avoided being arrested under such warrant, or being tried . . . but remained absent from said Republic of Mexico for a sufficient period of time to enable him to procure the dismissal of said proceedings under the law of Mexico on account solely of the lapse of time," and, conversely, that said criminal proceedings "were not dismissed on account of a determination of the case in favor of the plaintiff on the trial thereof on the merits, nor was it dismissed for failure to prosecute said case except as above set forth, nor was it dismissed on account of any withdrawal of the complaint."

The plaintiff demurred to this defence and also to the third defence which was not materially different from the second. The demurrer was sustained at Special Term. This judgment was reversed by the General Term, and the plaintiff now appeals.¹

Hiscock, J. The respondent's first reply to the appellant's attack upon its answer is of the *tu quoque* nature, it insisting that the complaint is as deficient in the statement of a good cause of action as the answer is alleged to be in the statement of a good defence. This contention is based upon the fact that the complaint does not allege any act subsequent or in addition to the mere issuance of a warrant in the criminal proceeding complained of; does not allege that the warrant was ever executed in any way whatever, or that the appellant was ever

¹ The statement of the case has been abridged and only a part of the opinion is given.—
Ed.

actually brought into said proceedings either by force of process or voluntary appearance. Therefore, the question is presented whether the mere application for and issuance to a proper officer for execution of a warrant on a criminal charge may institute and constitute such a prosecution as may be made the basis of a subsequent civil action by the party claimed to have been injured. In considering this question we must keep in mind that the facts alleged in the complaint, and in the light of which it is to be determined, do not show, as the answer does, that the defendant in those proceedings was beyond the jurisdiction of the court.

This question does not seem to have been settled by any decision which we regard as controlling on us.

The respondent cites the following authorities deciding it in the negative: *Newfield v. Copperman*,¹ *Lawyer v. Loomis*,² *Cooper v. Armour*,³ *Heyward v. Cuthbert*,⁴ *O'Driscoll v. M'Burney*,⁵ *Bartlett v. Cristliff*,⁶ *Gregory v. Derby*,⁷ *Paul v. Fargo*.⁸

The case last cited was concerned with an alleged malicious prosecution by means of civil process and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases, only two, *Heyward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each of them rested in whole or part on a principle not, as I believe, adopted in this state. In the former it was said that "The foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person." As I think we shall see hereafter, that is not a correct statement of the law in this state. In the other case it was stated, "The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy." I think that this doctrine, which if correct would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this state and elsewhere hereafter to be referred to.

The authorities holding to the contrary on the question above stated, and that the execution of the warrant is not necessary to lay the foundation for an action of malicious prosecution, are: *Addison on Torts*, vol. 2 [4th Eng. ed.], p. 478; *Newell on Malicious Prosecution*, sect. 30; *Stephens on Malicious Prosecution*, Am. ed., sect. 8; *Stapp v. Partlow*; ⁹ *Clarke v. Postan*; ¹⁰ *Feazle v. Simpson*; ¹¹ *Britton v. Granger*; ¹² *Holmes v. Johnson*; ¹³ *Coffey v. Myers*.¹⁴

¹ 15 Abb. Pr. [N. S.] 360.

⁴ 4 McCord, 354.

⁷ 8 C. & P. 749.

⁹ *Dudley's Repts.*, [Ga.] 176.

¹² 13 Ohio Cir. Ct. Repts. 281, 291.

² 3 T. & C. 393.

⁵ 2 Nott & McCord, 54.

⁸ 84 App. Div. 9.

¹⁰ 6 C. & P. 423.

¹³ *Busbee's L. R.* 44.

³ 42 Fed. 215.

⁶ 14 Atl. R. 518.

¹¹ 2 Ill. 30.

¹⁴ 84 Ind. 105.

And to the like effect in the absence of special statutory provisions in *Swift v. Witchard*.¹

Thus it is apparent, as before stated, that there is no controlling decision on this question and we are remitted to a search for some general considerations which may be decisive. It seems to me that these may be found and that they favor the view that a prosecution may be regarded as having been instituted even though a warrant has not been executed.

The first one of these considerations is found in the rule applied in civil actions and proceedings to an analogous situation. There it has many times been held that the mere issue of various forms of civil process for service or other execution is sufficient independent of statute to effect the commencement of a case or proceeding. *Carpenter v. Butterfield*,² *Cheetham v. Lewis*,³ *Bronson v. Earl*,⁴ *Ross v. Luther*,⁵ *Mills v. Corbett*,⁶ *Hancock v. Ritchie*,⁷ *Howell v. Shepard*,⁸ *Webster v. Sharpe*.⁹

I see no reason why a similar rule should not be applied to criminal proceedings, at least for the purposes of such an action as this.

Then there is another reason resting on justice which seems to me to lead us to adopt this conclusion. In opposition to what was said in the South Carolina case already referred to, the sole foundation for an action of malicious prosecution is not "the wrong done to the plaintiff by the direct detention or imprisonment of his person." In an action for false imprisonment that would be so. But in an action of the present type, the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation and character by a false accusation as well as that caused by arrest and imprisonment. This element "indeed is in many cases the gravamen of the action." *Sheldon v. Carpenter*; ¹⁰ *Woods v. Finnell*; ¹¹ *Townsend on Slander*, sec. 420; *Wheeler v. Hanson*; ¹² *Gundermann v. Buschner*; ¹³ *Lawrence v. Hagerman*; ¹⁴ *Davis v. Seeley*.¹⁵

But no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby cannot under any ordinary circumstances be recovered in an action for libel or slander. *Howard v. Thompson*; ¹⁶ *Woods v. Wiman*; ¹⁷ *Sheldon v. Carpenter*, *supra*; *Dale v. Harris*; ¹⁸ *Gabriel v. McMullin*; ¹⁹ *Hamilton v. Eno*; ²⁰ *Newell on Malicious Prosecution*, sec. 10.

Therefore, it follows that a person who has most grievously injured another by falsely making a serious criminal accusation against him

¹ 103 Ga. 193.

⁴ 17 Johns. 63.

⁷ 11 Ind. 48, 52.

¹⁰ 4 N. Y. 579, 580.

¹³ 73 Ill. App. 180.

¹⁶ 21 Wend. 319, 324.

¹⁹ 137 Iowa, 427.

² 3 Johns. Cases, 146.

⁵ 4 Cowen, 153.

⁸ 48 Mich. 472.

¹¹ 13 Bush Repts. 628.

¹⁴ 56 Ill. 68.

¹⁷ 47 Hun, 362, 364.

²⁰ 81 N. Y. 116.

³ 3 Johns. 42.

⁶ 8 How. Pr. 500.

⁹ 116 N. C. 466, 471.

¹² 161 Mass. 370.

¹⁵ 91 Iowa, 583.

¹⁸ 109 Mass. 193.

whereon a warrant has been actually issued, may escape all liability by procuring the warrant at that point to be withheld unless an action for malicious prosecution will lie. It seems to me that under such circumstances we should hold that such action will lie, if for no other reason than to satisfy that principle of law which demands an adequate remedy for every legal wrong.¹

VANN, J. I concur in the result because there was merely an attempt to prosecute with no actual prosecution. The Mexican court did not acquire jurisdiction of the person of the plaintiff, for he was not arrested, nor was process or notice of any kind served upon him. He was not brought into court and the prosecution could not end because it was never begun. He could not be a party defendant until he was notified or voluntarily appeared. He was threatened with prosecution, but neither his person nor his property was touched. There can be no prosecution unless knowledge thereof is brought home to the alleged defendant in some way. If there had been a prosecution commenced the crime could not have outlawed during the defendant's absence, as is admitted of record. While in civil actions, in order to arrest the Statute of Limitations, "an attempt to commence an action, in a court of record, is equivalent to the commencement thereof," still the attempt goes for naught unless followed by service, actual or constructive, within sixty days. (Code Civil Proc. § 399.) The rule was similar at common law. Although, in order to prevent injustice, an action was deemed to be commenced by the delivery of process for service, it was never treated as effectual for any purpose unless actual service was subsequently made. The authorities cited in the prevailing opinion illustrate this proposition.

In the absence of controlling authority, which it is conceded does not exist, I favor restricting rather than enlarging the scope of the action. This accords with the general position of the court upon the subject.

GRAY, HAIGHT and CHASE, JJ., concur with HISCOCK, J.; CULLEN, Ch. J., and WILLARD BARTLETT, J., concur with VANN, J.

*Order affirmed.*²

¹ The court decided that the answer was good. — Ed.

² In accordance with the opinion of the majority of the court see *Clarke v. Postan*, 6 C. & P. 423; *Stapp v. Partlow*, Dudley, Ga. 176; *Feazle v. Simpson*, 2 Ill. 30 (*semble*); *Holmes v. Johnson*, Busbee, 44; *Britton v. Granger*, 13 Oh. C. C. 281, 291.

In accordance with the opinion of the majority see *Gregory v. Derby*, 8 C. & P. 749, 750 (*semble*); *Cooper v. Armour*, 42 Fed. 215, 217; *Sheppard v. Furniss*, 19 Ala. 760 (*semble*); *Davis v. Sanders*, 133 Ala. 275, 278 (*semble*); *Newfield v. Copperman*, 15 Abb. Pr. n. s. 360 (*semble*); *Lawyer v. Loomis*, 3 Th. & C. 393, 395; *Mitchell v. Donanski*, 23 R. I. 94; *O'Driscoll v. McBurney*, 2 N. & McC. 354 (*semble*); *Heyward v. Cuthbert*, 4 McC. 354 (*semble*).

Compare *Swift v. Witchard*, 103 Ga. 193. — Ed.

CHAMBERS v. ROBINSON.

AT NISI PRIUS, CORAM RAYMOND, C. J. HILARY TERM, 1726.

[2 *Strange*, 691.]

AN action for a malicious prosecution of an indictment for perjury.

Upon the trial it appeared, the perjury was ill-assigned, so that the now plaintiff could not have been convicted; and that exception was taken to it by the judge, and he was acquitted without any examination of witnesses. But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones v. Gwynn*, where the distinction in *Salk*. 13 was denied, and held by the whole court that the action would lie, though the indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expense, and exposing him, but it serves no purpose of justice in bringing the party to punishment if he be guilty.¹

¹ *Pippet v. Hearn*, 5 B. & Al. 634; *Rutherford v. Dyer* (Ala. 1906), 40 So. 974; *Harrington v. Tibbet*, 143 Cal. 78; *Streight v. Bell*, 37 Ind. 550; *Shaul v. Brown*, 28 Iowa, 37; *Bell v. Keepers*, 37 Kan. 64; *Potter v. Giertsen*, 37 Minn. 386; *Stocking v. Howard*, 73 Mo. 25; *Hackler v. Miller*, 79 Neb. 209; *Dennis v. Ryan*, 65 N. Y. 385; *Kline v. Shuler*, 8 Ired. 484; *Ward v. Sutor*, 70 Tex. 343; *Strehlow v. Pettit*, 96 Wis. 22, *Accord*.

Alexander v. West (Ga. App. 1909), 64 S. W. R. 288, *Contra*. — ED.

SECTION I (*continued*).

(b) PREVIOUS TERMINATION OF THE PROSECUTION.

FISHER v. BRISTOW AND OTHERS.

IN THE KING'S BENCH, JUNE 15, 1779.

[*Reported in 1 Douglas, 215.*]

ACTION for a malicious presentment (for incest), in the ecclesiastical court of the archdeaconery of Huntingdon. Demurrer to the declaration and cause assigned, that it was not stated how the prosecution was disposed of, or that it was not still depending. The court were clearly of opinion, that the objection was fatal, and said it was settled, that the plaintiff in such an action, must show the original suit, wherever instituted, to be at an end; otherwise he might recover in the action, and yet be afterwards convicted on the original prosecution.

*Judgment for the defendants.*¹

¹ *Parker v. Langley*, 10 Mod. 210; *Whitworth v. Hall*, 2 B. & Ad. 695; *Mellor v. Baddeley*, 2 Cr. & M. 675; *Watkins v. Lee*, 5 M. & W. 270; *McCann v. Premeveau*, 10 Ont. 573; *Poitras v. LeBeau*, 14 Can. S. C. 742; *Stewart v. Sonneborn*, 98 U. S. 187; *Steel v. Williams*, 18 Ind. 161; *West v. Hayes*, 104 Ind. 251; *Olson v. Neal*, 63 Iowa, 214; *Wood v. Laycock*, 3 Met. (Ky.) 192; *Hamilburgh v. Shepard*, 119 Mass. 30; *Wilson v. Hale*, 178 Mass. 111; *Pixley v. Reed*, 26 Minn. 80; *Lowe v. Wartman*, 47 N. J. 413; *Clark v. Cleveland*, 6 Hill, 344; *Searll v. McCracken*, 16 How. Pr. 262; *Swartout v. Dickelman*, 12 Hun, 358; *Johnson v. Finch*, 93 N. Ca. 205; *Forster v. Orr*, 17 Oreg. 447; *Luby v. Bennett*, 111 Wis. 618 *Accord*.

Consequently, the Statute of Limitations does not run until the prosecution is terminated. *Mayor v. Hall*, 12 Can. S. C. 74; *Printup v. Smith*, 74 Ga. 157; *Rider v. Kite*, 61 N. J. 8.—*Ed.*

STEWART v. GROMETT.

IN THE COMMON PLEAS, NOVEMBER 11, 1859.

[Reported in 7 Common Bench Reports, New Series, 191.]

ERLE, C. J.¹ I am of opinion that our judgment in this case must be for the plaintiff. It is an action against the defendant for falsely and maliciously, and without reasonable or probable cause, making information on oath before a magistrate that the plaintiff had used threatening language to him, whereby he went in fear of bodily harm, and so procuring a warrant under which the plaintiff was incarcerated in the castle at Swaffham, for want of sureties, for a period of six months. It is admitted on the pleadings that the defendant did falsely and maliciously, and without reasonable or probable cause, procure that wrong to be done to the plaintiff; and the question is whether the declaration shows enough to entitle the plaintiff to maintain an action for that wrong. This is in some sort an action for a malicious prosecution; and it has been contended by Mr. Couch, for the defendant, that the case falls within the ordinary rule applicable to such actions, that the plaintiff must show that the proceeding terminated in his favor, and that no action lies where they are shown to have terminated against the accused. But I am of opinion that the distinction taken by Mr. Keane removes that objection, and shows that that rule does not apply to this case, because the proceeding before the magistrate being founded upon a statement which the party charged is not at liberty to controvert, is an *ex parte* proceeding, and, although it attains the result which is sought, it is not a judgment, but is in the nature of a writ of process. It is not like the case of an application to a magistrate upon a matter on which he is to exercise his discretion: there, the injury sustained by the party is the act of the law, and therefore no action lies unless the person who sets the magistrate in motion is actuated by malice. But here the law was directly put in motion by the defendant against the plaintiff, and, it must be assumed, falsely and maliciously and without reasonable or probable cause. If a party goes before a judge, under the 1 & 2 Vict. c. 110, with an affidavit of debt for the purpose of procuring a *capias* to arrest his debtor, upon a suggestion that he is going abroad, and that is done falsely and maliciously, and without reasonable or probable cause, an action lies. So, if a party go to the Court of Queen's Bench, and maliciously exhibit articles of the peace against another, supported by a false oath that such other had used threats against him, his statement being incontrovertible, it is clear to my mind that an action would lie. Can it make any difference that here the proceeding took place before a magistrate? It seems to me that the two proceedings are quite analogous: the same remedy is sought, only by a differ-

¹ Only the opinion of ERLE, C. J., is given — ED.

ent mode. As in the one case the truth of the articles cannot be controverted, so in the other the statement made before the magistrate upon oath cannot be contradicted by the accused. There is not the least sign of authority to show that the magistrate had any discretion, so that the plaintiff might have had a decision in his favor. In Burn's Justice, sureties of the peace are treated as being subject to precisely the same rule as articles of the peace at the sessions or in the Court of Queen's Bench, in respect of their truth being incontrovertible. And there is strong reason for assuming that to be the true state of the law; the fact of there being no authority exactly in point as to sureties of the peace, may well be accounted for by supposing that no one has entertained doubt enough upon it to take the opinion of any court. But as far as authority goes, *The King v. Doherty*,¹ and *Venafrá v. Johnson*,² are in favor of the plaintiff. In the latter case, Johnson made precisely the same application to the justices as was made here, and they exercised a precisely analogous jurisdiction, the only difference being that there the magistrates held the plaintiff to bail for his appearance at the sessions, whereas here the magistrate at once committed the plaintiff to jail until he should find the required sureties: and it was there decided by implication that the proceeding before the magistrate was incontrovertible; for, the court held that the judge was wrong in not leaving it to the jury to say whether or not the defendant believed the menaces when he put the law in motion against the plaintiff. If Mr. Couch's argument to-day is right, the counsel and the court in that case were all wrong. Upon principle, therefore, and upon authority, it seems to me that the argument for the plaintiff in this case ought to prevail.

*Judgment for the plaintiff.**

BASEBÉ v. MATTHEWS AND WIFE.

IN THE COMMON PLEAS, MAY 14, 1867.

[Reported in *Law Reports*, 2 *Common Pleas*, 684.]

THE declaration stated that the defendant Ellen falsely and maliciously, and without reasonable and probable cause, appeared before a justice of the peace, and charged the plaintiff with assaulting and beating her, contrary to the statute, and by false, scandalous, and malicious statements then made by the said Ellen before the justice, and without any reasonable and probable cause, caused the justice wrongfully to convict the plaintiff of the supposed offence, and to adjudge that he should pay a fine of 40s., and £1 5s. 6d. for costs, which said fine and

¹ 13 East, 171.

² 10 Bing. 301, 3 M. & Scott, 847.

³ *Hyde v. Greuch*, 62 Md. 577; *Pixley v. Reed*, 26 Minn. 80 (*semble*); *Apgar v. Woolston*, 43 N. J. 57, 65 (*semble*); *Bump v. Betts*, 19 Wend. 421; *Fortman v. Rottier*, 8 Oh. St. 548 *Accord.* — Ed.

costs the plaintiff was compelled to pay, *there being no appeal from the said conviction*; and that, by reason of the premises, the plaintiff had been injured in his reputation, and put to expense, &c.

Demurrer, on the ground that no action lies for a malicious prosecution, unless the prosecution has failed. Joinder.

Berresford appeared to support the demurrer; but the court called upon

C. C. Wood to support the declaration. The declaration charges that this person by false and malicious statements induced the magistrates to convict the plaintiff of an assault, and that he had no power to appeal against the conviction; and that is admitted by the demurrer. In no case yet has such a declaration been held not to be sufficient. In *Mellor v. Baddeley*¹ there was an opportunity of appealing; and this is relied on by the court in giving judgment.

The observations of the judges in *Steward v. Gromett* are also strongly in favor of the view now presented.²

BYLES, J. I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favor of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg v. Blake*,³ where Hale, C. J., says, that, "if such an action should be allowed," — that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court, — "the judgment would be blown off by a side-wind."

KEATING, J. I am entirely of the same opinion.

MONTAGUE SMITH, J. I am of the same opinion. In *Castrique v. Behrens*,⁴ which was an action for conspiring with certain persons fraudulently and unlawfully to procure an attachment and condemnation of a ship by a proceeding *in rem* in a foreign court, Crompton, J., in delivering the judgment of the court, says: "There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause, setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so, without actual legal damage: *Cotterell v. Jones*,⁵ *Barber v. Lesiter*.⁶ But, in such an action, it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favor of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal,

¹ 2 C. & M. 675, 678.

² The argument for the plaintiff is abridged. — Ed.

³ Hardr. 194.

⁴ 3 E. & E. 709, 721.

⁵ 11 C. B. 713.

⁶ 7 C. B. N. S. 175; 29 L. J. C. P. 161.

to hold that the decision was come to without reasonable and probable cause." The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a court of appeal in a matter in which the Legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action.

Judgment for the defendants.

SAMUEL PARKER v. GEORGE F. FARLEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER, 1852.

[Reported in 10 Cushing, 279.]

ACTION on the case for a malicious prosecution.

1. It was contended by the counsel for the defendant, that a termination of the suit, complained of as malicious, and without probable cause, by a *nolle prosequi*, was not such an acquittal or determination of the suit as would enable the plaintiff to maintain this action.

2. That the conviction of the plaintiff by the jury in 1845, was, in point of law, proof of probable cause. The court expressed an opinion favorable to the defendant on both points; whereupon a verdict was taken by consent for the defendant, subject to the opinion of the whole court, on these questions of law.¹

B. F. Butler, for the plaintiff.

J. G. Abbott, for the defendant.

SHAW, C. J. Upon the first point, the court are of opinion, that, according to a well-settled series of authorities, a plaintiff cannot maintain an action for a malicious criminal prosecution by indictment, by showing that the prosecution has been determined by a *nolle prosequi*.² This point has been so recently under the consideration of the court, in the case of *Bacon v. Towne*,³ that it seems sufficient to refer to that case, and the authorities there cited. It was said in the argument of

¹ The statement of the case is abridged. — Ed. .

² *Goddard v. Smith*, 6 Mod. 261, 1 Salk. 21, 2 Salk. 456, 3 Salk. 245, s. c. (*semble*); *Garing v. Fraser*, 76 Me. 37 (*semble*); *Bacon v. Towne*, 4 Cush. 217 (*semble*); *Brown v. Lakeman*, 12 Cush. 482 (*semble*); *Cardinal v. Smith*, 109 Mass. 158 (*semble*); *Smith v. Shackelford*, 1 N. & McC. 86 (*semble*) *Accord*. But in later cases — *Graves v. Dawson*, 130 Mass. 78, 133 Mass. 419; *Langford v. Boston Co.*, 144 Mass. 431 — the Massachusetts court has receded from the opinion of Shaw, C. J., and has closely approached the doctrine of *Brown v. Randall*, *infra*, 545. See also *Sayles v. Briggs*, 4 Met. 421, 426; *Bacon v. Waters*, 2 All. 400; *Moyle v. Drake*, 141 Mass. 238. — Ed.

³ 4 Cush. 217.

the present case, that what was then said was an *obiter dictum*, and not a judicial determination of any question then in controversy. It is true, that it was not necessary to the decision of the defendant's motion for a new trial, because the point had been decided in his favor on the trial, and excluded the plaintiff from recovering on two of his counts. But as the court had concluded to order a new trial on other points, and on such trial this point would present itself again *in limine*, it seemed to require the expression of an opinion by the court.

Were this a new and original question, to be decided upon principle, it might be doubted whether it would be just and wise to establish this as an inflexible rule of practice, because perhaps cases may be imagined, as where a party indicted has been long kept in court, always desirous and ready for a trial, and when a *nolle prosequi* is entered without his consent and against his remonstrance, where he ought not to be deprived of his right of showing that the suit was groundless and malicious. But the common law seems to have gone upon the ground, that before a party criminally prosecuted shall have a right to maintain an action and recover damages, against one who has acted as complainant in behalf of the commonwealth, and ostensibly for the public good, (an action certainly not to be favored,) he shall begin by offering a verdict in his favor, by a jury who have considered the cause on its merits. But even if it were now open to consider any such modified rule, we should be of opinion that it would not apply, when a *nolle prosequi* and discontinuance is entered by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, by the party prosecuted. In the present case, it appears by the record, that the plaintiff endeavored to obtain such exemption from trial by requiring the district attorney to enter a *nolle prosequi*.

Upon the other point also, the court are of opinion, that this action cannot be maintained. The main question in such suit is, whether there was probable cause for the prosecution complained of as malicious. Malice may be inferred from the fact that the complaint was groundless, but not the reverse. Want of probable cause is not to be inferred even from proof of express malice. And whether there was probable cause or not, is a question of law upon facts admitted or uncontested, or the truth of which is to be ascertained by the jury on the evidence submitted to them. Now, in looking into the record in this case, we find that, upon a trial of the plaintiff on this indictment in the Court of Common Pleas, the only trial by jury which has been had in the case, they found him guilty. Exceptions were taken by the defendant, to the directions and rulings of the court in matter of law; but upon their reconsideration in this court, they were overruled. It was at this stage of the cause, when the plaintiff stood liable to be sentenced for the offence with which he was charged in the indictment, that he applied to this court for a new trial, which was granted, to admit newly discovered evidence. But such evidence was never brought before a jury, and no

new trial was ever had. The court are therefore of opinion, that such a verdict of conviction upon instructions correct in matter in law, though afterwards set aside for another cause, must be regarded as proof of probable cause for the prosecution, and stand as a bar to the prosecution of this suit.

Judgment for the defendant.

JOHN BROWN v. NEHEMIAH G. RANDALL AND ANOTHER.

IN THE SUPREME COURT, CONNECTICUT, MARCH TERM, 1869.

[Reported in 36 Connecticut Reports, 56.]

CARPENTER, J.¹ The defendants complained to a grandjuror of the town of Norwich against the plaintiff, charging him with a breach of the peace, and induced the grandjuror to enter a complaint to a magistrate in due form, whereupon a warrant was issued, and the plaintiff arrested and held to answer the complaint. After remaining in custody several hours, the magistrate informed the defendants and their counsel, who acted for the grandjuror, that he was ready to proceed with the trial. The defendants sent word to the court that they should prosecute the complaint no further, and thereupon the plaintiff was discharged. It is alleged in the declaration that this proceeding was malicious and without probable cause, and the jury have found that allegation to be true.

The important question in this case is whether, upon the facts alleged and proved, the plaintiff is entitled to recover. All the material averments seem to have been proved except the allegation of acquittal. That was not proved, and the court charged the jury that it was not necessary. The defendants complain of this, as they rely upon the non-existence of that fact as a complete defence to the action. Decisions of courts of the highest respectability, both in England and in this country, justify this claim. It does not appear that this question has ever been directly determined by this court. We are referred to the case of *Monroe v. Maples*.² But no such question arose in that case. It simply decided that a person convicted of the crime charged against him could not maintain the action. We are therefore at liberty to determine the question upon principle.

The grounds of this action are, the malice of the defendant, the want of probable cause, and an injury sustained by the plaintiff. 1 Swift's Digest, 491. The conviction of the plaintiff is justly considered as conclusive evidence of probable cause. The authorities referred to virtually decide — without sufficient reason as it seems to

¹ Everything is omitted, except the opinion of the court on the question of the termination of the prosecution. — Ed.

² 1 Root, 553.

us—that the termination of the prosecution by a *nolle prosequi*, or abandonment, was equally conclusive upon that question.

One reason given for this is, that no termination of the prosecution in favor of the accused short of an acquittal will discharge the crime or be a bar to a new indictment. This reasoning is not satisfactory. The possibility that the plaintiff may be again prosecuted for the same alleged offence is not inconsistent with an entire want of probable cause in the first prosecution. This reason seems to have been disregarded in *Sayles v. Briggs*.¹ The complainant abandoned the prosecution against the plaintiff after a trial, and the magistrate, who could only bind over or discharge the person accused, discharged him. The court held that the action could be maintained. Yet such a discharge could be no bar to a subsequent prosecution.

Another reason given is, that the common law will not favor actions in behalf of a party criminally prosecuted against one who has acted as complainant in behalf of the public, and ostensibly for the public good; it therefore requires that the plaintiff in such an action shall begin by offering the verdict of a jury who have considered the cause on its merits. This may be a very proper caution to a jury, and a matter which ought to be considered by them in weighing evidence, but we see no sufficient reason for adopting it as an absolute rule of law, the effect of which is, in some cases at least, to shut out the truth. No such rule has been adopted in this State, and we think it is contrary to the prevailing notions of the profession. Judge Swift, in his Digest, vol. 1, p. 491, states five different modes of terminating a prosecution in favor of the accused which will lay the foundation for this action, and one of them is, “when the prosecution has been abandoned and given up.”

In *Parker v. Farley*, Shaw, C. J., in speaking of the rule under consideration, says: “Were this a new and original question, to be decided upon principle, it might be doubted whether it would be just and wise to establish this as an inflexible rule of practice.”

On the whole we think it wise and safe, when a prosecution has been abandoned, as this was, without any arrangement with the accused, and without any request from him that it should be so abandoned, to leave the question of probable cause to the jury.

The charge of the court was in harmony with these views, and we do not advise a new trial.

In this opinion the other judges concurred.²

¹ 4 Met. 421.

² *Cotton v. Wilson*, Minor, 203; *Hurgreave v. Union Co.* 141 Cal. 585; *Chapman v. Woods*, 6 Blackf. 504; *Richter v. Castner*, 45 Ind. 444; *Coffey v. Myers*, 84 Ind. 105; *Kelley v. Sage*, 12 Kans. 109; *Bell v. Matthews*, 37 Kans. 686; *Yocum v. Polly*, 1 B. Mon. 358; *Stanton v. Hart*, 27 Mich. 539; *Swenagaard v. Davis*, 33 Minn. 368 (*semble*); *Kennedy v. Holladay*, 25 Mo. Ap. 503; *Casebeer v. Drahoble*, 13 Neb. 465; *Casebeer v. Rice*, 18 Neb. 205; *Apgar v. Woolston*, 43 N. J. 57; *Lowe v. Wartman*, 47 N. J. 413; *Clark v. Cleveland*, 6 Hill, 344 (*semble*); *Moulton v. Beecher*, 8 Hun, 100; *Fay v. O'Neill*, 36 N. Y. 11 (*semble*); *Murray v. Lackey*, 2 Murph. 368; *Rice v. Ponder*, 7 Ired. 390; *Hatch v. Cohen*.

84 N. Ca. 602; *Marcus v. Bernstein*, 117 N. Ca. 31; *Douglas v. Allen*, 56 Oh. St. 156; *Murphy v. Moore* (Pa. 1887), 11 Atl. R. 665; *Driggs v. Burton*, 44 Vt. 124; *Woodworth v. Mills*, 61 Wis. 44; *McCrosson v. Cummings*, 5 Hawn, 391 *Accord*.

TERMINATION OF A PREVIOUS CIVIL ACTION.—If a party sues for a malicious arrest or seizure of property in a civil action, a voluntary abandonment of the latter action by the plaintiff therein is equivalent to its termination in favor of his adversary. *Arundell v. White*, 14 East, 216; *Nicholson v. Coghill*, 4 B. & C. 21; *Pierce v. Street*, 3 B. & Ad. 397; *Watkins v. Lee*, 5 M. & W. 270; *Ross v. Norman*, 5 Ex. 359; *Emery v. Ginman*, 24 Ill. Ap. 65; *Cardinal v. Smith*, 109 Mass. 158; *Mayer v. Walter*, 64 Pa. 286.

The rule is the same as to malicious prosecutions of civil actions without arrest or attachment in jurisdictions where one is allowed to sue for malicious prosecution of a civil action, without more. *Wall v. Toomey*, 52 Conn. 35; *Marbourg v. Smith*, 11 Kans. 554; *Mitchell v. Sullivan*, 30 Kans. 231. See also *Wilson v. Hale*, 178 Mass. 111; *Luby v. Bennett*, 111 Wis. 113.

But an abandonment of the previous proceeding, brought about as a compromise, is not a termination in favor of the original defendant. *Wilkinson v. Howell*, M. & M. 495; *Kinley v. Wallace*, 36 Cal. 462 (*semble*); *Emery v. Ginman*, 24 Ill. Ap. 65; *Fadner v. Filer*, 27 Ill. Ap. 506; *Marks v. Gray*, 42 Me. 86; *Sartwell v. Parker*, 141 Mass. 406; *Langford v. Boston Co.*, 144 Mass. 431; *Rachelman v. Skinner*, 46 Minn. 191; *McCormick v. Sisson*, 7 Cow. 715; *Gallagher v. Stoddard*, 47 Hun, 101; *Atwood v. Beirne*, 26 N. Y. Sup. 149; *Welch v. Cheek*, 115 N. Ca. 310; *Clark v. Everest*, 2 Grant (Pa.), 416; *Mayer v. Walter*, 64 Pa. 283, 287; *Rounds v. Humes*, 7 R. I. 535; *Russell v. Morgan*, 24 R. I. 134. Unless the settlement was obtained by duress of the person or the goods of the original defendant. *Morton v. Young*, 55 Me. 24.—*Ed.*

SECTION I (*continued*).

(c) WANT OF PROBABLE CAUSE.

COXE v. WIRRALL.

KING'S BENCH, HILARY TERM, 1607.

[Croke, James, 193.]

THIS was an action on the case, in nature of a conspiracy. The declaration charged, that the defendant *false et malitiose* procured the plaintiff to be indicted of the ravishment of one Mary Wirrall, and to be detained in prison for that cause until he was acquitted; to his damages, &c.

The defendant pleads, that the said Mary Wirrall was his daughter, and complained to him that she was ravished by the plaintiff; whereupon he made application to Sir Thomas Twynn, justice of peace in the same county, who convented the plaintiff before him, and examined him; and upon his examination, and the testimony of others, bound the plaintiff to appear at the next gaol-delivery; and bound the defendant to prefer his bill of indictment. Whereupon the plaintiff appearing, he preferred his bill of indictment, which was found: and thereupon the plaintiff was committed, arraigned, and acquitted; which is the same procurement of the indictment and acquittal whereof the action is brought.

To this plea the plaintiff demurred; and, after judgment at the bar, it was resolved that the plea was good.

First, It was agreed by the Court, that the declaration to procure one to be falsely and maliciously indicted is good; for as conspiracy lies where two conspire falsely to indict one, so an action lies where one alone falsely and maliciously procures another to be indicted.¹

Secondly, Although it was alleged that the plea was not good, because it is not averred that felony was committed; and without a fact, suspicion is no cause of arrest, as 8. Edw. 4. pl. 3. 5. Hen. 7. pl. 5. 7. Hen. 4. pl. 35.; *a multo fortiori*, it is no cause without an act done to indict me; for he was too credulous, to cause one to be indicted upon complaint of so small a girl. And Croke, Justice, was of that opinion. Yet all the other Justices held, that inasmuch as the father did it upon his daughter's complaint, to whom by nature he is compassionate, although it had not been cause of arrest for suspicion of felony (no felony being committed), yet it is a good excuse of his cause of complaint to the justice of peace, who binding over the one to appear, and the other to prefer the indictment, it is good cause to excuse him from the malicious procuring of the indictment, which is the ground of this action. And all this matter being confessed by de-

¹ This is the earliest reported case of the kind. — ED.

murrer, the Court shall take it for a good cause of excuse; but if it had been alleged that there was not any ravishment, and that the defendant knew so much, it might peradventure have been otherwise. Wherefore it was adjudged for the defendant.

FOSHAY v. FERGUSON.

IN THE SUPREME COURT, NEW YORK, MAY, 1846.

[Reported in 2 Denio, 617.]

By the Court, BRONSON, C. J.¹ There was evidence enough in the case to warrant the jury in finding, that the defendant set the prosecution in motion from a bad motive. But all the books agree, that proof of express malice is not enough, without showing also the want of probable cause. Probable cause has been defined, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief, that the person accused is guilty of the offence with which he is charged. *Munns v. Nemours*.² However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show, that he had reasonable grounds for believing him guilty at the time the charge was made. In *Swain v. Stafford*,³ the action was brought against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made, the defendant had received such information as induced a belief of the plaintiff's guilt; and although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported. The doctrine that probable cause depends on the knowledge or information which the prosecutor had at the time the charge was made, has been carried to a great length. In *Delegal v. Highley*,⁴ which was an action for maliciously, and without probable cause, procuring a third person to charge the plaintiff with a criminal offence, the defendant pleaded specially, showing that the plaintiff was guilty of the offence which had been laid to his charge; and the plea was held bad in substance, because it did not show that the defendant, at the time the charge was made, had been informed, or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocence of the accused; but upon the belief of the prosecutor concerning such guilt or innocence. *Seibert v. Price*.⁵

Without going into a particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before

¹ Only the opinion of the court is given. — Ed.

² 3 Wash. C. C. 37.

³ 3 Iredell, N. Car. 289, and 4 id. 392.

⁴ 3 Bing. N. C. 950.

⁵ 5 Watts & Serg. 438.

the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle: and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action, if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offence. If the parties intended the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that he made no complaint until the plaintiff commenced the two suits against him, goes far to show that he was obnoxious to that charge; and that he was governed more by his own interest, than by a proper regard to the cause of public justice. But however culpable the defendant may have been for neglecting his duty to the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and so long as it exists, it is a complete defence. There is enough in the defendant's conduct to induce a rigid scrutiny of the defence. But if upon such scrutiny it appear, that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported.

On a careful examination of the case, I am of opinion that the verdict was clearly wrong. But as the charge of the judge is not given, we must presume that the case was properly submitted to the jury; and a new trial can therefore only be had on payment of costs.

*Ordered accordingly.*¹

¹ Anon. 6 Mod. 73; Turner v. Ambler, 10 Q. B. 252; Hailes v. Marks, 7 H. & N. 56; Wheeler v. Nesbitt, 24 How. 544, 550; Stewart v. Souneborn, 98 U. S. 187; Sanders v. Palmer, 55 Fed. Rep. 217; Jordan v. Alabama Co., 81 Ala. 220; Marable v. Mayer, 78 Ga. 710; Joiner v. Ocean Co., 86 Ga. 238; Ames v. Snider, 69 Ill. 376; Barrett v. Spauld, 70 Ill. 408; Leyenberger v. Paul, 12 Ill. Ap. 635; Morrell v. Martin, 17 Ill. Ap. 336; Adams v. Lisher, 3 Blackf. 241; Green v. Cochran, 43 Iowa, 544; Yocum v. Polly, 1 B. Mon. 358; Medcalfe v. Brooklyn Co., 45 Md. 198; Flickinger v. Wagner, 46 Md. 580; Stone v. Crocker, 24 Pick. 81; Coupal v. Ward, 106 Mass. 289; Hamilton v. Smith, 39 Mich. 222; Smith v. Austin, 49 Mich. 286; Webster v. Fowler, 89 Mich. 303; Burris v. North, 64 Mo. 426; Renfro v. Prior, 22 Mo. Ap. 403; Kennely v. Holladay, 25 Mo. Ap. 503, 519; Woodman v. Prescott, 65 N. H. 224; Heyne v. Blair, 62 N. Y. 19; Miller v. Milligan, 48 Barb. 30; Dietz v. Langfitt, 63 Pa. 234; Emerson v. Cochran, 111 Pa. 619; Bartlett v. Brown, 6 R. I. 37; Welch v. Boston Co., 14 R. I. 609; Stoddard v. Roland, 31 S. Ca. 342; Kelton v. Bevins, Cooke (Tenn.), 90; Evans v. Thompson, 12 Heisk. 534; Johnson v. State (Texas, 1893), 22 S. W. R. 43; South Bank v. Suffolk Bank, 27 Vt. 505 *Accord.* — ED.

SAMUEL CLOON v. ELBRIDGE GERRY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE, 1859

[*Reported in 13 Gray, 201.*]

SHAW, C. J.¹ In an action for a malicious prosecution against one, in the name of the Commonwealth, the averment on the part of the plaintiff, that the complaint was made without reasonable cause, lies at the foundation of the suit; and although it is in form a negative proposition, it is incumbent on the plaintiff to establish it by satisfactory proof. This kind of suit, by which the complainant in a criminal prosecution is made liable to an action for damages, at the suit of the person complained of, is not to be favored; it has a tendency to deter men who know of breaches of the law, from prosecuting offenders, thereby endangering the order and peace of the community. Absence of probable cause is essential; from want of probable cause, malice may be inferred; but from malice, even if express, want of probable cause cannot be inferred.

An ultimate acquittal of the offence charged, though necessary to be proved, is but a short step towards the maintenance of an action for malicious prosecution. Malice, and absence of any reasonable and probable cause, must also concur with an acquittal.

In the present case, the prosecution complained of was a complaint before a justice of the peace by whom the plaintiff was convicted; from this judgment he appealed, and on trial in the Court of Common Pleas was acquitted.

On the trial, it appeared from the pleadings and evidence, and was admitted, that the complaint was for an offence which the magistrate had, by law, jurisdiction to hear, decide and render a judgment in; also, that neither in the trial before the magistrate, nor in the trial in the Common Pleas, was the defendant a witness. On this case, the court ruled that such a conviction was proof of probable cause; or, to state the proposition with more precision, it negatived the plaintiff's leading and essential averment that the complaint was made without reasonable and probable cause, and that, for this reason, the action could not be maintained, and thereupon ordered a nonsuit.

The court are of opinion that this direction was right. The question of reasonable and probable cause, when the facts are not contested, is a question of law. And when the plaintiff had been convicted by a tribunal, constituted by law, with authority to render a judgment, which, if not appealed from, would have been conclusive of his guilt, and such judgment is not impeached on the ground of fraud, conspiracy or subornation in its procurement, although afterwards reversed on another trial, it constitutes sufficient proof that the prosecution was

¹ Only the opinion of the court is given. — Ed.

not groundless, and to defeat an action for malicious prosecution. The case of *Whitney v. Peckham*¹ is directly in point, and we think it is well sustained by authorities.

It is said that the question of probable cause is a mixed question of law and fact, and that the facts should have been left to the jury. Here no fact material to the question was controverted, and then there was nothing to leave to a jury.

*Exceptions overruled.*²

¹ 15 Mass. 243.

² CONVICTION REVERSED.—It is generally agreed that a conviction of the defendant in the criminal proceeding, although subsequently reversed, negatives the absence of probable cause, unless it is also made to appear that the conviction was procured by the fraud of the instigator of the criminal proceeding. Accordingly, a declaration alleging the conviction and its reversal, but not alleging any such fraud, is bad on demurrer. *Reynolds v. Kennedy*, 1 Wils. 232; *Crescent Co. v. Butcher's Co.*, 120 U. S. 141; *Knight v. Internat. Co.*, 61 Fed. 87; *Blackman v. West Co.*, 126 Fed. 252; *Carpenter v. Sibley*, 153 Cal. 215; *Goodrich v. Warner*, 21 Conn. 432 (*semble*); *Adams v. Bicknell*, 126 Ind. 210; *Moffatt v. Fisher*, 47 Iowa, 473; *Bowman v. Brown*, 52 Iowa, 437; *Olson v. Neal*, 63 Iowa, 214; *Barber v. Scott*, 92 Iowa, 521; *Ross v. Hixon*, 46 Kan. 550, 555; *Spring v. Besore*, 12 B. Mon. 551; *Kaye v. Kean*, 16 B. Mon. 839; *Duerr v. Ky. Co. (Ky. 1909)*, 116 S. W. R. 325; *Wittham v. Gower*, 14 Me. 362; *Paxson v. Caswell*, 22 Me. 212; *Whitney v. Peckham*, 15 Mass. 243; *Dennehy v. Woodsun*, 100 Mass. 195, 197; *Phillips v. Kalamazoo*, 58 Mich. 33 (*see Spalding v. Lowe*, 56 Mich. 366); *Boogher v. Hough*, 99 Mo. 183; *Nehr v. Dobbs*, 47 Neb. 863; *Burt v. Place*, 4 Wend. 591; *Palmer v. Avery*, 41 Barb. 290; *Root v. Rose*, 6 N. Dak. 575; *Herman v. Brookerhoff*, 8 Watts, 240 (*semble*); *Welch v. Boston Co.*, 14 R. I. 609; *Hull v. Sprague*, 23 R. I. 188; *Memphis Co. v. Williamson*, 9 Heisk. 314.

In a few jurisdictions the conviction, although set aside, is treated as conclusive evidence of probable cause, proof of fraud in its procurement being inadmissible. *Hartshorn v. Smith*, 104 Ga. 235; *Clements v. Odorless Co.*, 67 Md. 461, 605 (*Bryan, J., diss.*); *Parker v. Huntington*, 7 Gray, 36; *Griffin v. Sellars*, 4 Dev. & B. 176.

In Virginia, on the contrary, a count alleging a conviction and its reversal is sufficient without any allegation in regard to fraud. *Jones v. Finch*, 84 Va. 204 (*semble*); *Blanks v. Robinson*, Va. L. J. (1886) 398 (overruling *Womack v. Circle*, 32 Grat. 324). *See Hale v. Boylen*, 22 W. Va. 234.

COMMITMENT FOR GRAND JURY.—The holding of the defendant for the grand jury is *prima facie* evidence of probable cause. *Miller v. Chicago Co.*, 41 Fed. R. 898; *Ewing v. Sanford*, 19 Ala. 606; *Ganea v. Southern Co.*, 51 Cal. 140; *Diemer v. Herber*, 75 Cal. 287; *Ritchey v. Davis*, 11 Iowa, 124; *Ross v. Hixon*, 46 Kans. 550; *Ricord v. Central Co.*, 15 Nev. 167; *Ash v. Marlow*, 20 Ohio, 119; *Raleigh v. Cook*, 60 Tex. 488; *Hale v. Boylen*, 22 W. Va. 234.

FINDING OF INDICTMENT.—The finding of an indictment is *prima facie* evidence of probable cause. *Garrard v. Willets*, 4 J. J. Marsh. 628; *Sharpe v. Johnston*, 76 Mo. 660; *Peck v. Chouteau*, 91 Mo. 138.

FAILURE OF THE PROSECUTION.—The failure of the original prosecution is in some jurisdictions regarded as *prima facie* evidence of the absence of probable cause. *Miller v. Chicago Co.*, 41 Fed. R. 898, 901; *Straus v. Young*, 36 Md. 246; *Whitfield v. Westbrook*, 40 Miss. 311; *Bostick v. Rutherford*, 4 Hawks, 83; *Barhight v. Tammany*, 158 Pa. 545; *Jones v. Finch*, 84 Va. 204; *Winn v. Peckham*, 42 Wis. 493; *Lamuel v. Cleary*, 88 Wis. 473; *Brady v. Stiltner*, 40 W. Va. 289. In others there is no such presumption. *Inclendon v. Berry*, 1 Camp. 203, n.; *Stewart v. Sonneborn*, 98 U. S. 187, 195; *Thompson v. Beacon Co.*, 56 Conn. 493; *Skidmore v. Bricker*, 77 Ill. 164; *Bitting v. Ten Eyck*, 82 Ind. 421; *Williams v. Van Meter*, 8 Mo. 339; *Boeger v. Langenberg*, 97 Mo. 390; *Scott v. Simpson*, 1 Sandf. 601; *Eastman v. Monasted*, 32 Oreg. 291; *Bekkeland v. Lyons*, 96 Tex. 255.—ED.

RAVENGA v. MACKINTOSH.

IN THE KING'S BENCH, MAY 8, 1824.

[Reported in 2 Barnewall & Cresswell, 693.]

THIS was an action for a malicious arrest: plea not guilty. At the trial before Abbott, C. J., at the London sittings after last Hilary term, the jury was directed to find a verdict for the defendant, if they were of opinion that, at the time when the arrest was made, Mackintosh acted truly and sincerely upon the faith of the opinion given by his professional adviser, actually believing that Ravenga was personally liable, and that he might be lawfully arrested, and that he (Mackintosh) could recover in that action; but to find for the plaintiff, if they were of opinion that Mackintosh believed that he must fail in the action, and that he intended to use the opinion as a protection, in case the proceedings were afterwards called in question; and that he made the arrest, not with a view of obtaining his debt, but to compel the plaintiff to sanction the debentures. The jury found a verdict for the plaintiff, with £250 damages.¹

The Attorney-General now moved for a new trial.

BAYLEY, J. I have no doubt that in this case there was a want of probable cause. I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be), he is not liable to an action of this description.² A party, how-

¹ The statement of the evidence, the argument for the defendant, and the concurring opinion of HOLROYD, J., are omitted. — ED.

² Snow v. Allen, 1 Stark. 502; Abrath v. North Eastern Co., 11 Q. B. Div. 440, 11 Ap. Cas. 247; Scougall v. Stapleton, 12 Ont. 206; Stewart v. Sonneborn, 98 U. S. 187; Blunt v. Little, 3 Mason, 102; Cuthbert v. Calloway, 35 Fed. R. 466 (*semble*); Miller v. Chicago Co., 41 Fed. R. 898; Cogswell v. Bohn, 43 Fed. R. 411; Staunton v. Goshorn, 94 Fed. 52; McLeod v. McLeod, 73 Ala. 42; Jordan v. Alabama Co., 81 Ala. 220; Lemay v. Williams, 32 Ark. 186; Bliss v. Wyman, 7 Cal. 257; Jones v. Dowd, 71 Cal. 89; Brooks v. Bradford, 4 Colo. Ap. 410; Joiner v. Ocean Co., 86 Ga. 238; Baker v. Langley, 3 Ga. App. 751; Ross v. Innis, 26 Ill. 259; Ames v. Snider, 69 Ill. 376; Barrett v. Spaid, 70 Ill. 408; Brown v. Smith, 83 Ill. 291; Roy v. Goinge, 112 Ill. 656; Aldridge v. Churchill, 28 Ind. 62; Paddock v. Watts, 116 Ind. 146; Adams v. Bicknell, 126 Ind. 210; Mesher v. Iddings, 72 Iowa, 553; Schippel v. Norton, 38 Kans. 567; Stevens v. Fassett, 27 Me. 266; Soule v. Winslow, 66 Me. 447; Cooper v. Utterbach, 37 Md. 282; Hyde v. Greuch, 62 Md. 577; Torsch v. Dell, 88 Md. 459; Stone v. Swift, 4 Pick. 389; Monaghan v. Cox, 155 Mass. 487; Stanton v. Hart, 27 Mich. 539; Perry v. Salier, 92 Mich. 72; Moore v. Northern Co., 37 Minn. 147; Boyd v. Mendenhall, 53 Minn. 274; Alexander v. Harrison, 38 Mo. 268; Burris v. North, 64 Mo. 426; Whitfield v. Westbrook, 40 Miss. 311; Jonassen v. Kennedy, 39 Neb. 313; Magowan v. Rickey, 64 N. J. 402; Hall v. Snyder, 6 Barb. 83; Richardson v. Virtue, 2 Hun, 208; Turner v. Dinnegar, 20 Hun, 465; Beal v. Robeson, 8 Ired. 276; Ash v. Marlow, 20 Ohio, 119; Walter v. Sample, 25 Pa. 275; Smith v. Walter, 125 Pa. 453; Bartlett v. Brown, 6 R. I. 37; Jackson v. Bell, 5 S. Dak. 257; Kendrick v. Cypert, 10 Humph. 291; St. Johnsbury Co. v. Hunt, 59 Vt. 294; Forbes v. Hagman, 75 Va. 168; Sutton v. McConnell, 46 Wis. 269.

But see Brewer v. Jacobs, 23 Fed. R. 217; Ramsey v. Arrott, 64 Tex. 320; Glasgow

ever, may take the opinions of six different persons, of which three are one way and three another. It is therefore a question for the jury, whether he acted *bona fide* on the opinion, believing that he had a cause of action. The jury in this case have found, and there was abundant evidence to justify them in drawing the conclusion, that the defendant did not act *bona fide*, and that he did not believe that he had any cause of action whatever. Assuming that the defendant's belief that he had a cause of action would amount to a probable cause, still, after the jury have found that he did not believe that he had any cause of action whatever, the judge would have been bound to say, that he had not reasonable or probable cause of action.

*Rule refused.*¹

HADDRICK v. HESLOP AND RAINE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1848.

[Reported in 12 Queen's Bench Reports, 267.]

CASE for maliciously and without reasonable and probable cause indicting the plaintiff for perjury. Averment that the plaintiff was tried and acquitted, and judgment given that he should depart without day, as by the record appeared, &c.

Plea, by Heslop: Not guilty. Issue thereon.

On the trial, before Wightman, J., at the Durham Summer Assizes, 1847, it was shown, on the part of the plaintiff, that the now defendant Heslop received the account of Haddrick's evidence from another party, and then stated that he would indict Haddrick for perjury; and that his informant thereupon expressed an opinion that there was no ground for such indictment; on which Heslop said that, even if there were not

v. Owen, 69 Tex. 167; *Shannon v. Jones*, 76 Tex. 141; *Mr. Tiedeman's Note*, 21 Am. L. Reg. N. S. 582.

The advice must be that of a lawyer, and not a layman. *Murphy v. Larson*, 77 Ill. 172; *McCullough v. Rice*, 59 Ind. 580; *Olmstead v. Partridge*, 16 Gray, 381; *Beal v. Robeson*, 8 Ired. 276. Even though the layman be a justice of the peace. *Coleman v. Henrick*, 2 Mack, 189; *Straus v. Young*, 36 Md. 246; *Monaghan v. Cox*, 155 Mass. 487 (*semble*); *Gee v. Culver*, 12 Oreg. 228; *Brobst v. Ruff*, 100 Pa. 91; *Sutton v. McConnell*, 46 Wia. 269. But see *Bell v. Rawles*, 93 Cal. 222; *Sisk v. Hurst*, 1 W. Va. 53. Compare *Marks v. Hastings*, 101 Ala. 165.

The lawyer must have no personal interest in the controversy. *Smith v. King*, 62 Conn. 515; *White v. Cave*, 71 Me. 555.

In *Hazzard v. Flurry*, 120 N. Y. 223, the Court of Appeals (Second Division) held that mistaken advice of counsel upon a point of law would not justify the client, since every one is presumed to know the law. Surely that much-abused fiction has seldom been so glaringly perverted in behalf of injustice.—Ed.

¹ *Vann v. McCreary*, 77 Cal. 434; *Boyd v. Mendenhall*, 53 Minn. 274; *Acton v. Coffman*, 74 Iowa, 17; *Johnson v. Miller*, 82 Iowa, 693; *Sharpe v. Johnston*, 76 Mo. 660; *Ames v. Rathbun*, 37 How. Pr. 289; *Laird v. Taylor*, 66 Barb. 139; *Davenport v. Lynch*, 6 Jones (N. Ca.) 545 *Accord*.—Ed.

sufficient grounds for the indictment, it would tie up the mouths of Hinde and Haddrick for a time, and that he would move for a new trial. No witnesses were called for the defence. The learned judge asked the jury whether Heslop believed that there was reasonable ground for indicting, and whether he had indicted from malice. The jury answered that Heslop did not so believe; and, as to the malice, they said that they thought that the word "malice" was strong, but that they thought the defendant had indicted from an improper motive. The learned judge then decided that the indictment was without reasonable or probable cause, and told the jury that they might infer malice from the improper motive. Verdict for the plaintiff.

In Michaelmas term (November 5th), 1847,

Bliss moved for a new trial, on the grounds of misdirection.¹

First: the question of the defendant's belief ought not to have been left to the jury. It is for the judge to decide whether there was reasonable and probable cause. It is true that he may, in order to decide this, obtain the opinion of the jury upon facts which, when found, he himself is to act upon in deciding as to the reasonableness and probability. But belief is not such a fact: it is material as to the malice, but there may well exist reasonable and probable cause constituted by facts from which the defendant has wrongly drawn an inference of want of cause. It is otherwise where the belief becomes material as an ingredient in the question of *mala fides*: that was the case in *Ravenga v. Mackintosh*, where the defendant rested his defence upon the ground that he had acted *bona fide* on a legal opinion, and the jury found that he had not so acted. Nothing should be left to the jury but "the truth of the facts proved, and the justice of the inferences to be drawn from such facts;" and it is only as affecting those questions that the belief of the party is material.

Next: the jury were misdirected as to malice. The mere fact that the defendant had an indirect motive, however improper, in instituting the prosecution does not show malice. The malice required in this action is express malice in fact, not mere malice in law. In the judgment of Lords Mansfield and Loughborough, in *Johnstone v. Sutton*,² it is said:³ "From the want of probable cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied." The jury ought therefore to have been told that the indirect motive was quite consistent with absence of malice, unless the defendant knew (not simply believed) that there was no probable cause, or unless there were some evidence of express malice towards the plaintiff.

¹ The statement of facts and the argument for the defendant are abridged; the concurring opinions of COLERIDGE, WIGHTMAN, and ERLE, JJ., are omitted. — ED.

² In Exch. Ch. 1 T. R. 510, reversing the judgment of the Court of Exchequer in *Sutton v. Johnstone*, 1 T. R. 493. Judgment of Exch. Ch. affirmed on error, in Dom. Proc., 1 T. R. 784. s. c. 1 Bro. P. C. 76. (2d ed.).

³ 1 T. R. 545.

LORD DENMAN, C. J. It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause. Reference has been made to *Turner v. Ambler*,¹ where there was an allusion to a decision of my Brother Maule, upheld afterwards in the Common Pleas,² to the effect that reasonable and probable cause cannot exist without belief. There may possibly be some difficulty in distinguishing the case last mentioned from some others: but I think that belief is essential to the existence of reasonable and probable cause: I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense.³ Proof of the absence of belief is almost always involved in the proof of malice. In *Turner v. Ambler*¹ there was no point directly made at the trial as to want of belief: the only question was whether the facts of themselves bore out the probability and reasonableness. But, where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury. It is not absolutely necessary that this belief should be the motive on which he acted: he may act from malice, and yet, if there was reasonable and probable cause in which he believed, the case against him must fail.

Rule refused as to misdirection.

¹ 10 Q. B. 252.

² The case alluded to is perhaps *Broad v. Ham*, 5 New Ca. 722. By the report of s. c. in 8 Scott, 40, the cause appears to have been tried before Maule, B.

³ *Broad v. Ham*, 5 B. N. C. 722; *Turner v. Ambler*, 10 Q. B. 252; *Roret v. Lewis*, 5 D. & L. 371; *Hinton v. Heather*, 14 M. & W. 131; *Williams v. Bankes*, 1 F. & F. 557; *Chatfield v. Comerford*, 4 F. & F. 1008; *Shrosbery v. Osmaston*, 37 L. T. Rep. 792; *Steed v. Knowles*, 79 Ala. 446; *Harkrader v. Moore*, 44 Cal. 144; *Bell v. Rawles*, 93 Cal. 222; *Galloway v. Stewart*, 49 Ind. 156; *Donnelly v. Burkett*, 75 Iowa, 613; *Harphan v. Parker*, 52 Me. 502, 505; *Mitchell v. Wall*, 111 Mass. 492; *Bartlett v. Hawley*, 38 Minn. 308; *Pick v. Chouteau*, 91 Mo. 138; *Chicago Co. v. Kriski* (Neb. 1891), 46 N. W. R. 520; *Howard v. Thompson*, 21 Wend. 319; *Burlingame v. Burlingame*, 8 Cow. 141; *Fagnan v. Knox*, 66 N. Y. 525; *Anderson v. How*, 116 N. Y. 386; *Weas v. Stevens*, 128 N. Y. 123; *Wilson v. King*, 39 N. Y. Sup'r Ct. 384; *King v. Colvin*, 11 R. I. 582; *Scott v. Shelor*, 28 Grat. 391; *Forbes v. Hagman*, 75 Va. 168; *Spear v. Hiles*, 67 Wis. 350; *Baker v. Kilpatrick*, 7 Br. Col. L. R. 150; *Harcourt v. Aiken*, 22 N. Zeal. L. R. 389; *Clift v. Birmingham*, 4 W. Aust. L. R. 20 *Accord.* — Ed.

SECTION I (*continued*).

(d) MALICE.

MITCHELL v. JENKINS, CLERK.

IN THE KING'S BENCH, NOVEMBER 11, 1833.

[Reported 5 *Barnwell & Adolphus*, 588.]

THIS was an action on the case for a malicious arrest.

At the trial, before Taunton, J., at the last Summer Assizes for the county of Devon, it appeared, that the plaintiff was indebted to the defendant in the sum of £45, for one year's composition of tithe; and that the sum of £16 5s. was due to the plaintiff from the defendant; that the defendant, under the advice of his attorney, arrested the plaintiff for the whole sum of £45, instead of for the balance, after deducting the sum of £16 5s. The defendant, on finding out that he was mistaken in point of law, and that he should only have arrested for the balance, discontinued the action.

There was no evidence at all of malice in fact; but the learned judge told the jury, that, as the plaintiff ought not, by law, to have been arrested for more than the balance, the law implied malice; and that the only question for their consideration was, the amount of damages; upon which a verdict was found for the plaintiff for £20.

A rule had been obtained, in a former term, calling on the plaintiff to show cause why that verdict should not be set aside, and a new trial had;¹ against which —

Follett now showed cause.

Coleridge, Serjt., and *Bere*, contra.

DENMAN, C. J. Every arrest by a creditor for more than is due, is, in some sense, a wrongful act. By statute, if it be made without reasonable or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs, and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and to prove malice as an independent fact; though it may in some instances be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide, as a matter of fact, whether there be malice or not. I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury.²

¹ The statement of facts is taken from 3 L. J. K. B. N. S. 35. The arguments of counsel and the concurring opinions of PATTERSON and TAUNTON, JJ., are omitted. — ED.

² *Willans v. Taylor*, 6 Bing. 183; *Bussell v. Gibbons*, 30 L. J. Ex. 75; *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Stewart v. Sonneborn*, 98 U. S. 187; *Sanders v. Palmer*, 55 F. R. 918; *Stanton v. Goshorn*, 94 Fed. 52; *Bell v. Rawles*, 93 Cal. 222; *Smith v. King*, 62 Conn. 515;

Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE, J. I am also of opinion that there ought to be a new trial, on the ground that the learned judge withdrew altogether from the consideration of the jury the question of malice. I have always understood, since the case of *Johnstone v. Sutton*,¹ which was decided long before I was in the profession, that no point of law was more clearly settled than that in every action for a malicious prosecution or arrest, the plaintiff must prove what is averred in the declaration, viz. that the prosecution or arrest was malicious and without reasonable or probable cause: if there be reasonable or probable cause, no malice, however distinctly proved, will make the defendant liable; but when there is no reasonable or probable cause, it is for the jury to infer malice from the facts proved. That is a question in all cases for their consideration, and it having in this instance been withdrawn from them, it is impossible to say whether they might or might not have come to the conclusion that the arrest was malicious. It was for them to decide it, and not for the judge. I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives.² That would not be the case where, there being an

Boyd v. Mendenhall, 113 Ill. 656; *Helwig v. Beckner*, 149 Ind. 131; *Lawrence v. Leathers*, 31 Ind. Ap. 414; *Atchison Co. v. Allen*, 70 Kan. 743; *Metrop. Co. v. Miller*, 114 Ky. 754; *Medcalfe v. Brooklyn Co.*, 45 Md. 198; *Thelin v. Dorsey*, 59 Md. 539; *Campbell v. Balt. Co.*, 97 Md. 341; *Good v. French*, 115 Mass. 201; *Bartlett v. Hawley*, 38 Minn. 308; *Shafer v. Hertzog*, 92 Minn. 171; *McNulty v. Walker*, 64 Miss. 198; *Cohn v. Saidel*, 71 N. H. 558; *Magowan v. Rickey*, 64 N. J. 402; *Heyne v. Blair*, 62 N. Y. 19; *Fagnan v. Knox*, 60 N. Y. 525; *Anderson v. How*, 116 N. Y. 336; *L. I. Union v. Seitz*, 180 N. Y. 243; *Viele v. Gray*, 10 Abb. Pr. 10; *Stanford v. Grocery Co.*, 143 N. Ca. 419; *Leahey v. March*, 155 Pa. 458; *Cooper v. Flemming*, 114 Tenn. 40; *Landa v. Obart*, 45 Tex. 539 *Accord.* — ED.

¹ 1 T. R. 510.

² *Abrath v. North Eastern Co.*, 11 Q. B. Div. 440, 443, 455; *Wiggin v. Coffin*, 3 Story, 1; *Johnson v. Ebberts*, 11 Fed. Rep. 129, 6 Sawy. 538 s. c.; *Brewer v. Jacobs*, 23 Fed. Rep. 217; *Coleman v. Allen*, 79 Ga. 637; *South Western Co. v. Mitchell*, 80 Ga. 438; *Metrop. Co. v. Miller*, 114 Ky. 754; *Pullen v. Glidden*, 66 Me. 302; *Wills v. Noyes*, 12 Pick. 324; *Mitchell v. Wall*, 111 Mass. 492; *Ross v. Langworthy*, 13 Neb. 492; *Gee v. Culvers*, 13 Oreg. 598; *Culbertson v. Cabeen*, 29 Tex. 247, 256; *Sebastian v. Cheney* (Texas, 1893), 24 S. W. 970; *Barron v. Mason*, 31 Vt. 189, 198; *Forbes v. Hagman*, 75 Va. 168; *Spear v. Hiles*, 67 Wis. 350 *Accord.*

In *Abrath v. North Eastern Co.*, *supra*, malice was defined by Brett, M. R., p. 448, as "a malicious intention in the mind of the defendant, that is, not with the mere intention of carrying the law into effect," and by Bowen, L. J., as "a malicious spirit, that is, an indirect and improper motive, and not in furtherance of justice." See also especially *Pullen v. Glidden*, and *Johnson v. Ebberts*, cited *supra* in this note. *McGown v. Rickey*, N. J., 1900, 45 A. 804; *Peterson v. Ridorf*, Neb., '96, 68 N. W. 963; *Nobb v. White*, Iowa, '97, 72 N. W. 556; *Brooks v. Bradford*, Colo., '94, 36 P. 503; *Jackson v. Bell*, S. Dak., '94, 58 N. W. 671. — ED.

unsettled account, with items on both sides, one of the parties, believing *bona fide* that a certain sum was due to him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bona fide* under a wrong notion of the law and pursuant to legal advice. The question of malice having in this case been wholly withdrawn from the jury, I think the rule for a new trial must be made absolute. *Rule absolute.*¹

VANDERBILT v. MATHIS.

IN THE SUPREME COURT, CITY OF NEW YORK, FEBRUARY, 1856.

[Reported in 5 Duer, 304.]

By the Court, BOSWORTH, J.²—To maintain an action for malicious prosecution, three facts, if controverted, must be established:

1. That the prosecution is at an end, and was determined in favor of the plaintiff.
2. The want of probable cause.
3. Malice.

In such an action, it is necessary to give some evidence of the want of probable cause. It is insufficient to prove a mere acquittal; that,

¹ Farmer v. Darling, 4 Burr. 1971; Busst v. Gibbons, 80 L. J. Ex. 75; Coulter v. Dublin Co., 60 L. T. 180; Hicks v. Faulkner, 46 L. T. Rep. 127 (affirming s. c. 8 Q. B. D. 167); Wheeler v. Nesbitt, 24 How. 544; Stewart v. Sonneborn, 98 U. S. 191; Wiggin v. Coffin, 3 Story, 1; Burnap v. Albert, Taney, 244; Benson v. McCoy, 36 Ala. 710; Lunsford v. Dietrich, 93 Ala. 565; Bozeman v. Shaw, 37 Ark. 160; Levy v. Brannan, 39 Cal. 485; Harkrader v. Moore, 44 Cal. 144; Porter v. White, 5 Mackey, 180; Harpham v. Whitney, 77 Ill. 32; King v. Ward, 77 Ill. 603; Boyd v. Mendenhall, 112 Ill. 656; Frankfurter v. Bryan, 12 Ill. Ap. 549; Gardiner v. May, 24 Ill. Ap. 286; Newell v. Downs, 8 Blackf. 523; Oliver v. Pate, 43 Ind. 132; Ritchey v. Davis, 11 Iowa, 124; Atchison Co. v. Watson, 37 Kans. 773; Gourgues v. Howard, 27 La. An. 338; Humphries v. Parker, 52 Me. 502; Medcalfe v. Brooklyn Co., 45 Md. 198; Mitchell v. Wall, 111 Mass. 492; Bartlett v. Hawley, 38 Minn. 308; Greenwade v. Mills, 81 Miss. 464; Sharpe v. Johnston, 59 Mo. 557; Finley v. St. Louis Co., 99 Mo. 559; McKown v. Hunter, 30 N. Y. 625; Farnam v. Feeley, 56 N. Y. 451; Heyne v. Blair, 62 N. Y. 19; Thompson v. Lumley, 50 How. Pr. 105; Voorhees v. Leonard, 1 Th. & C. 148; Johnson v. Chambers, 10 Ired. 287; Gee v. Culver, 12 Ore. 228, 13 Ore. 598; Schofield v. Ferrers, 47 Pa. 194; Dietz v. Langfitt, 63 Pa. 234; Gilliford v. Windel, 108 Pa. 142; Bell v. Graham, 1 N. & M'C. 278; Campbell v. O'Bryan, 9 Rich. 204; Willis v. Knox, 5 S. Ca. 474; Caldwell v. Burnett, 22 S. C. N. S. 1; Evans v. Thompson, 12 Heisk. 34; Stansell v. Young, 64 Tex. 660; Shannon v. Jones, 76 Tex. 141; Barron v. Mason, 31 Vt. 189; Carleton v. Taylor, 50 Vt. 220; Scott v. Shelor, 28 Grat. 891; Forbes v. Hagman, 75 Va. 168.

But see, *contra*, Wilson v. Bower, 64 Mich. 138. — ED.

² Only the opinion of the court is given. — ED.

alone, is not *prima facie* evidence of the want of probable cause. *Gorton v. De Angelis*.¹

It is equally essential, that the former prosecution should appear to have been maliciously instituted. Malice may be inferred from the want of probable cause, but such an inference is one which a jury is not required to make, at all events, merely because they may find the absence of probable cause.

Unless the evidence, in relation to the circumstances under which the prosecution was ended, and that given to establish the want of probable cause, justify the inference of malice, other evidence, in support of it, must be given.

Evidence as to the conduct of the defendant, in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication, are properly admitted to prove malice. Such evidence must be given as will justify a jury in finding the existence of malice.

The rule is uniformly stated, that, to maintain an action, for a former prosecution, it must be shown to have been without probable cause, and malicious. *Vanduzer v. Linderman*,² *Murray v. Long*,³ *Willans v. Taylor*.⁴

The judge, at the trial, charged, that the fact, that the plaintiff was discharged before the magistrate showed, *prima facie*, that there was no probable cause for the arrest, and shifted the burden of proof from the plaintiff to the defendant, who was bound to show, affirmatively, that there was probable cause.

He was requested to charge, "that the discharge of Vanderbilt was not *prima facie* evidence of the want of probable cause." This he refused to do. To this refusal to charge, and to the charge as made, the defendant excepted.

He also charged, "that, if probable cause is made out, the question of malice becomes immaterial, except as bearing on the question of damages."

"This question of malice, in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

He was requested to charge, "that the jury could not find a verdict for the plaintiff, unless he has proved that there was no probable cause for the complaint, and not even then, unless they believe, from the evidence, that, in making the complaint, the defendant acted from malicious motives." This the judge declined to do, and to his refusal to so charge the defendant excepted.

Although the evidence which establishes the want of probable cause may be, and generally is, such as to justify the inference of malice, yet we understand the rule to be, that when it is a just and proper inference

¹ 6 Wend. 418.

² 1 Wend. 140; 2d Stark. Ev. 494.

³ 10 J. R. 110.

⁴ 6 Bing. 183.

from all the facts and circumstances of the case, upon all the evidence given in the cause, "that the defendant was not actuated by any improper motives, but only from an honest desire to bring a supposed offender to justice, the action will not lie, because such facts and circumstances disprove that which is of the essence of the action, viz., the malice of the defendant in pressing the charge."

In *Bulkley v. Smith*,¹ the court stated the rule to be, "that, in order to maintain a suit for a malicious prosecution, the plaintiff is bound to prove the entire want of a probable cause for the accusation, and the actual malice of the defendant in making it. Malice is a question of fact, which, when the case turns upon it, must be decided by the jury."

Story, J., in *Wiggin v. Coffin*, instructed the jury that two things must concur, to entitle a plaintiff to recover in such an action: "The first is, the want of probable cause for the prosecution; the second is, malice in the defendant in carrying on the prosecution. If either ground fail, there is an end of the suit."

In *Vanduzer v. Linderman*,² the court said: "No action lies, merely for bringing a suit against a person, without sufficient ground. To maintain a suit for a former prosecution, it must appear to have been without cause, and malicious."

If the charge must be understood to mean, that if the want of probable cause was established, the plaintiff was entitled to recover, although the jury should believe, from the whole evidence, that, in making the complaint, the defendant did not act from malicious motives, then we deem it to be erroneous. This construction is the only one, of which the language of the instruction appears to be susceptible; for the judge, in charging the jury, stated that the "question of malice in fact, supposing that probable cause did not exist, is material only as affecting the question of damages."

Malice in fact, is that kind of malice which is to be proved. When malice may be, and is inferred, from the want of probable cause, it is actual malice which is thus proved.

There is no theoretical malice which can satisfy this rule, and which can coexist with the established fact, that the prosecution was instituted in an honest belief of the plaintiff's guilt, and with no other motives than to bring a supposed offender to justice.

The question of malice may be a turning-point of the controversy, in an action of this nature.

The want of probable cause may be shown, and yet, upon the whole evidence, in any given case, it may be a fair question for the determination of a jury, whether the defendant was actuated by malice. If the whole evidence is such, that a jury cannot properly doubt the honesty and purity of the motive which induced the former prosecution, and if they fully believe that it was instituted from good motives,

¹ 2 Duer, 271.

² 10 J. R. 110.

and in the sincere conviction that the plaintiff was guilty of the offence charged, and without malice, the defendant would be entitled to a verdict.

The charge made, and which was excepted to, must be deemed to have been made, to give the jury a rule of action, in disposing of the case upon the whole evidence. We think it was not only calculated to mislead, but was erroneous.

A new trial must be granted, with costs to abide the event.¹

¹ *Brown v. Hawkes*, [1891] 2 Q. B. 718; *Grant v. Book*, 25 Nova Scotia, 266 *Accord.* — Ed.

SECTION I. (*continued*).

(c) DAMAGE.

BYNE v. MOORE.

IN THE COMMON PLEAS, NOVEMBER 13, 1813.

[*Reported in 5 Taunton, 187.*¹]

THIS was an action for a malicious prosecution in indicting the plaintiff for an assault and battery. The only evidence on the part of the plaintiff being, that the bill was preferred and not found, Lord Chief Baron Macdonald, who tried the cause, nonsuited him.²

Best, Serjt., had obtained a rule *nisi* to set aside that nonsuit and have a new trial; against which

Shepherd, Serjt., showed cause.

MANSFIELD, C. J. I feel a difficulty to understand how the plaintiff could recover in the present action, wherein he could recover no damages, because he clearly has not proved that he has sustained any: I can understand the ground upon which an action shall be maintained for an indictment which contains scandal, but this contains none, nor does any danger of imprisonment result from it: this bill was a piece of mere waste paper. All the cases in Buller's *Nisi Prius*, 13, are directly against this action, for the author speaks of putting the plaintiff to expense, and affecting his good fame, neither of which could be done here. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action. The judge too might certify in this cause against the costs, if the damages had been under 40s.

HEATH, J., concurred.

CHAMBRE, J. It would be a very mischievous precedent if the action could be supported on this evidence. *Rule discharged.*³

¹ 1 Marsh. 12, s. c. — Ed.

² The statement of the case has been taken from 1 Marsh. 12; the arguments of counsel are omitted. — Ed.

³ See *Savile v. Roberts*, 1 Ld. Ray. 374; 12 Mod. 208, s. c.

"It is difficult to see on what grounds it can be maintained that a charge of breaking the peace conveys no imputation on the character of the person charged, and it may be doubted whether the authority of the cases above mentioned (*Byne v. Moore* and *Savile v. Roberts*) would now be recognized on this point." Clerk & Lindsell, *Torts*, 502. — Ed.

SECTION I (*continued*).

(f) PARTY PROSECUTED GUILTY, ALTHOUGH ACQUITTED.

MACK v. SHARP.

SUPREME COURT, MICHIGAN, DECEMBER 14, 1904.

[138 *Michigan Reports*, 448.]

MONTGOMERY, J.¹ The court also ruled throughout the case that in this action the defendant was not at liberty to prove that the plaintiff was in fact guilty of the criminal offence imputed to him in the prosecution instituted by the defendant. It is well established by authority that in an action for malicious prosecution it is a complete defence to show that the plaintiff was in fact guilty of the offence charged against him by defendant, and this though the proof of guilt is furnished by evidence not known to defendant when the prosecution against the plaintiff was instituted. This testimony is not in such case offered in support of probable cause, but to show that the plaintiff has suffered no wrong by his arrest. The law considers that, if a criminal is fortunate enough to escape conviction, he should rest content with his good luck, and not belabor one who suspected his guilt and acted accordingly. As was said in *Newton v. Weaver*²:—

“The action for malicious prosecution was designed for the benefit of the innocent, and not of the guilty. It matters not whether there was proper cause for the prosecution, or how malicious may have been the motives of the prosecutor, if the accused is guilty he has no legal cause for complaint.”

See, also, *Threefoot v. Nuckols*; ³ *Whitehurst v. Ward*; ⁴ *Parkhurst v. Masteller*; ⁵ *Turner v. Dinnegar*; ⁶ *Lancaster v. McKay*.⁷

The judgment is reversed, and a new trial ordered.

The other Justices concurred.⁸

¹ Only a portion of the opinion is given. — Ed.

² 13 R. I. 617.

³ 68 Miss. 123.

⁴ 12 Ala. 264.

⁵ 57 Iowa, 478.

⁶ 20 Hun, 465.

⁷ 103 Ky. 616.

⁸ *Whitehurst v. Ward*, 12 Ala. 264; *Shannon v. Simms*, 146 Ala. 673; *Whipple v. Gorsuch*, 82 Ark. 252; *Adams v. Lisher*, 3 Blackf. 241; *Bruley v. Rose*, 57 Iowa, 651; *Parkhurst v. Masteller*, 57 Iowa, 478; *Lancaster v. McKay*, 103 Ky. 616, 624; *Bacon v. Towne*, 4 Cush. 217, 241; *Threefoot v. Nuckols*, 68 Miss. 616, 624; *Morris v. Corson*, 7 Cow. 281; *Turner v. Dinnegar*, 20 Hun, 465; *Bell & Percy*, 5 Ired. 83; *Johnson v. Chambers*, 10 Ired. 287; *Thurber v. Eastern Ass'n*, 118 N. Ca. 129 *Accord*. — Ed.

SECTION II.

Malicious Institution of Proceedings in Bankruptcy.

CHAPMAN v. PICKERSGILL.

IN THE COMMON PLEAS, MICHAELMAS TERM, 1762.

[Reported in 2 Wilson, 145.]

ACTION upon the case for falsely and maliciously suing out a commission of bankrupt against the plaintiff, who declared upon three counts; in the first, having stated his honesty, he alleges that the defendant did falsely and maliciously exhibit a petition to the Lord Chancellor that the plaintiff was indebted to him in £200, and had committed an act of bankruptcy, that the commission thereupon issued, and the plaintiff was declared a bankrupt, and that afterwards the commission was superseded; and the plaintiff avers that he never committed any act of bankruptcy; the second count is much the same, with the like averment; the third count is much the same, but without such averment. To this the defendant pleaded the general issue, and there was a general verdict and damages for the plaintiff taken, upon all the three counts; whereupon it was moved that the judgment might be arrested.

This case was argued twice at the bar, in two former terms by Serjeant *Hewitt* and Serjeant *Burland* for the defendant, and by Serjeant *Whitaker* and Serjeant *Nares* for the plaintiff; and in this term the Lord Chief Justice gave the opinion of the whole court, that judgment must be for the plaintiff.

LORD CHIEF JUSTICE. Upon the arguing of this case, the first objection was, that this action will not lie, there being a remedy given by statute, that a proceeding on a commission of bankruptcy, was a proceeding in nature of a civil suit; and that no action of this sort was ever brought: but we are all of opinion that this action is maintainable.¹

The general grounds of this action are, that the commission was falsely and maliciously sued out, that the plaintiff has been greatly damaged thereby, scandalized upon record, and put to great charges in obtain-

¹ *Watson v. Norbury*, Sty. 3, 201; *Brown v. Chapman*, 1 W. Bl. 427; *Cotton v. James*, 1 B. & Ad. 128; *Whitworth v. Hall*, 2 B. & Ad. 698; *Hay v. Weakley*, 5 C. & P. 361; *Farley v. Danks*, 4 E. & B. 499; *Johnson v. Emerson*, L. R. 6 Ex. 329; *Metropolitan Bank v. Pooley*, 10 Ap. Cas. 210; *Stewart v. Sonneborn*, 98 U. S. 187; *Wilkinson v. Goodfellow Co.*, 141 Fed. 218; *Lawton v. Green*, 5 Hun, 157; *King v. Sullivan*, (Tex. Civ. Ap. 1906) 92 S. W. R. 51; *Carleton v. Taylor*, 50 Vt. 220 (*semble*) *Accord*. Similarly an action will lie without proof of special damage for a malicious and unfounded presentation of a petition to wind up a trading company. *Quartz Co. v. Eyre*, 11 Q. B. Div. 674; *Wyatt v. Palmer*, [1899] 2 Q. B. 106 (*semble*). — ED.

ing a *supersedeas* to the commission; here is falsehood and malice in the defendant, and great wrong and damage done to the plaintiff thereby. Now, wherever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself. See 5 Mod. 407, 8; 10 Mod. 218; 12 Mod. 210. I take these to be two leading cases, and it is dangerous to alter the law. See also 12 Mod. 273; 7 Rep. Bulwer's case, 1. 2 Leon. — 1 Ro. Abr. 101; 1 Ven. 86; 1 Sid. 464. But it is said this action was never brought; and so it was said in *Ashby and White*; I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief, and this of suing out a commission of bankruptcy falsely and maliciously, is of the most injurious consequence in a trading country.

It is further said the stat. 5 Geo. 2, has given a remedy, and therefore this action will not lie; but we are all of opinion, that in this case the plaintiff would have been entitled to this remedy by action at common law, if this Act had never been made, and that the statute being in the affirmative, hath not taken away the remedy at law. 2 Raym. 163. And this is an universal rule, that an affirmative statute is hardly ever repealed by a subsequent affirmative statute, for if it is possible to reconcile two statutes they shall both stand together; if they cannot be reconciled, the last shall be a repeal of the first; but the most decisive answer is, that this statute-remedy is a most inadequate and uncertain remedy; for though there be the most outrageous malice and perjury, and the party injured suffer to the amount of ten or twenty thousand pounds, yet the Chancellor has no power to give him more than the penalty of £200; besides, the method of applying to the Chancellor, is more tedious, expensive, and inconvenient than this common law remedy, and this case in its nature is more properly the province of a jury, than of any judge whatever.

It is further objected, that in the third count there is no averment that the plaintiff was not indebted to the defendant, or ever committed an act of bankruptcy; but no case was cited to show such averment to be necessary; the ground and substance of the declaration is falsehood and malice; there are no instances of such averments in conspiracy, that the party was innocent, or did not do the fact on which he was indicted, but the precedents are the other way. In an action for words, as for saying a man is a thief, the plaintiff has no occasion to aver he is not a thief, and this case is analogous; for after the plaintiff has alleged that the commission was false and malicious, it would be tautology, to make such averment that he was not indebted, &c., and this declaration would have been good on a demurrer; more clearly it is so, after a verdict.

Judgment for the plaintiff.

SECTION III.

Malicious Inquisition of Lunacy.

LOCKENOUR v. SIDES AND ANOTHER.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1877.

[Reported in 57 *Indiana Reports*, 380.]

FROM the Washington Circuit Court.

H. Heffren and *S. B. Voyles*, for appellant.*T. L. Collins* and *A. B. Collins*, for appellees.

WORDEN, J.¹ This was an action by the appellant against the appellees, to recover damages for an alleged malicious prosecution.

Demurrer, for want of sufficient facts, sustained, and exception. Final judgment for defendants.

Errors assigned upon the rulings in sustaining the demurrer.

The complaint alleged, in substance, that the defendants, conspiring and confederating together, maliciously and without probable cause, instituted and carried on proceedings against the plaintiff, in that court, at the March term thereof, 1874, to procure him to be adjudged insane, and to thereby deprive him of the right and liberty to manage and control his property, and to place him under guardianship; that the defendant Shoemaker filed the complaint or statement in writing, alleging the plaintiff's unsoundness of mind, and that a summons issued thereupon and was served upon the plaintiff herein, requiring him to appear in that behalf; that he did appear, and was put to great trouble and expense in employing counsel and attorneys in that behalf, to wit, an expense of three hundred dollars; that by reason of the false charges thus made by the conspirators, the plaintiff was compelled to exert himself beyond his physical powers, he being an old man and in feeble health, to meet and resist the false charges thus made, whereby he became prostrated and broken down in health, to such an extent that he was compelled to employ physicians to attend upon, prescribe for, and nurse him for the period of four months, at an expense of two hundred dollars; during all which time his business suffered great loss and waste.

The prosecution resulted in the discharge of the plaintiff herein from the proceeding.

The second paragraph was much the same as the first in its general features, but alleged that the defendants hired James Mahan to file the complaint.

Both paragraphs set out the matter complained of very fully and in detail, but we have thought it unnecessary to transcribe them here in

¹ The opinion has been slightly abridged. — Ed.

full. We have only stated enough to show the general nature of the action. The averments are full in each paragraph, and each states facts sufficient, in our opinion, to constitute a cause of action, if an action will lie for prosecuting such a proceeding maliciously and without probable cause.

The statute provides for the trial of the question of unsoundness of mind, "whenever any person shall by statement in writing, represent to the court having probate jurisdiction, in any county, that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate." If found to be of unsound mind, a guardian is to be appointed for him, who is to have custody of his person and the management of his estate. If the person is found not to be of unsound mind, the court shall give judgment for costs against the person making the complaint. See 2 R. S. 1876, p. 598.

The appellees claim, as we understand their brief, that the plaintiff cannot recover, inasmuch as the proceedings to test his sanity were not criminal proceedings, and he was not arrested or in any manner deprived of his personal liberty, nor was his property interfered with; and as to the expense to which he was put, he was fully indemnified by his judgment for costs against the parties filing the complaints.

We are aware that it has been sometimes thought that an action will not lie for maliciously, and without probable cause, prosecuting a mere civil action. Thus it is said in 2 Addison Torts, p. 752, "If one man prosecutes a civil action against another maliciously, and without reasonable and probable cause, an action for damages is not maintainable against the prosecutor of the action." The more modern doctrine, however, and especially the American doctrine, seems to be otherwise. 1 Hilliard Torts, 4th ed., p. 443, sec. 11.

In England, it is held, that an action will lie for falsely and maliciously suing out a commission of bankruptcy. *Chapman v. Pickersgill*. See, also, *Farlie v. Danks*.¹

In turning to the American cases, we find that in *Whipple v. Fuller*,² it was held, that "an action on the case at common law, is sustainable for a vexatious civil suit, in which there was no arrest, or holding to bail."

CHURCH, J., said, in delivering the opinion of the court:—

"But we wish to place our decision of this question upon broader principles; principles which we believe have received the sanction of the common law in its earliest ages. Before the statute of Marlbridge, which was passed in the 52d year of Hen. III., no costs were recoverable in civil actions. This statute, and others subsequently enacted, gave costs to successful defendants, as it is said, by way of damages against the plaintiff, *pro falso clamore*. Whatever might have been true when the several statutes giving costs were enacted, we cannot, at this day, shut our eyes to the truth known by every-

¹ 30 Eng. Law & Eq. 115.

² 11 Conn. 581.

body, that taxable costs afford a very partial and inadequate remuneration for the necessary expenses of defending an unfounded suit; and of course this remedy is not adequate to repair the injury thus received; and the common law declares, that for every injury there is a remedy. Before the statutes entitling defendants to costs existed, they had a remedy at common law for injuries sustained by reason of suits which were malicious and without probable cause. . . . And this principle is, and ought to be, operative still, in all cases where the taxation of costs is not an ample remedy. *Saville v. Roberts*.¹

"It is upon this principle, in part at least, that actions have ever been sustained for malicious criminal prosecutions, in which no costs are taxed in favor of the accused. 1 Salk. 14. 10 Mod. 148. *Smith v. Hixon*.²

"So also, if two or more persons conspire to vex and harass any person with groundless and malicious civil suits, they were not only punishable *criminaliter*, but liable to a civil action. *Staundford P. C.* 172. 1 Inst. 562. *Co. Litt.* 161 *a.*"

In the more recent case of *Closson v. Staples*,³ the same doctrine was held, after full consideration of the question. The court said, in conclusion, upon that branch of the case:—

"We are of opinion that where a civil suit is commenced and prosecuted maliciously and without reasonable or probable cause, and is terminated in favor of the defendant, the plaintiff in such suit is liable to the defendant in an action on the case for the damages sustained by him in the defence of that original suit, in excess of the taxable costs obtained by him; and to maintain an action to recover such damages, it is not material whether the malicious suit was commenced by process of attachment or by summons only."

To the same effect are the cases of *Pangburn v. Bull*; ⁴ *Cox v. Taylor's Adm'r*.⁵ See, also, *Vanduzor v. Linderman*; ⁶ *White v. Dingley*.⁷

The proceedings to procure the plaintiff to be found insane, and to place him under guardianship, are not entirely like a civil action, in which the plaintiff therein claims some right in his own behalf. If the proceedings were instituted and carried on by the defendants maliciously and without probable cause, as alleged, the defendants were officious intermeddlers, without any claim of right or interest in the matter; and they are, in our opinion, liable to the plaintiff for the damages, in excess of the taxable costs, sustained by him by means of the proceedings.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

¹ 12 Mod. 208; s. c. 1 Salk. 14.

² 42 Vt. 209.

³ 10 B. Monroe, 17.

⁷ 4 Mass. 433.

² 2 Stra. 977.

⁴ 1 Wend. 345.

⁶ 10 Johns. 106.

SECTION IV.

Malicious Arrest, Attachment, or Execution.

STRIBLER v. JONES AND WATERS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1670.

[Reported in 1 Levinz, 275.]

CASE, and declares, that the defendant falsely and maliciously devising to damnify him, and to hinder him from going about his affairs, sued a *latitat* against him out of the King's Bench in trespass, with *ac etiam assumpsit* for £500 and caused him to be arrested and imprisoned for such a time, whereas in truth he had not any cause of action, *vel saltem non tantam causam actionis*. After verdict for the plaintiff, it was moved in arrest of judgment, that it is not positively said, *that he had not cause of action*; but *none, or at least not so great*; and it is not so great if it fails but of 1s. of so much. But the court to the contrary, it is found to be done maliciously, wherefore judgment was ruled for the plaintiff. But for that the *teste* and return of the *lat'* was not certainly shown, the court would advise upon this execution.¹

TOMLINSON AND SPERRY v. HENRY WARNER.

IN THE SUPREME COURT, OHIO, DECEMBER, 1839.

[Reported in 9 Ohio Reports, 104.]

MALICIOUS prosecution. From Licking. The plaintiffs declared that they were residents of the town of Newark, and possessed of a large amount of personal property, deposited in a warehouse to be forwarded to New York, for a market; and that the defendant well knowing the premises, and that the plaintiffs had not absconded, but contriving and maliciously intending wrongfully to injure them, made

¹ *Malicious Arrest*. — Daw v. Swain, 1 Sid. 424; Parker v. Langley, Gilb. 163; 10 Mod. 210, s. c.; Goslin v. Wilcock, 2 Wils. 302; Sinclair v. Eldred, 4 Taunt. 7; Pierco v. Street, 3 B. & Ad. 397; Crozer v. Pilling, 4 B. & C. 26; Saxon v. Castle, 6 A. & E. 652; Roret v. Lewis, 5 D. & L. 371; Medina v. Grove, 10 Q. B. 152; Daniels v. Fielding, 16 M. & W. 200 (*semble*, see Clerk v. Lindsell, Torts, 520); Moore v. Guardner, 16 M. & W. 595 (*semble*); Ross v. Norman, 5 Ex. 359; Ventress v. Rosser, 73 Ga. 534; Joiner v. Ocean Co., 86 Ga. 238; Cardinal v. Smith, 109 Mass. 158; Hamilburgh v. Shepard, 119 Mass. 30; Stanfield v. Phillips, 78 Pa. 73; Emerson v. Cochran, 111 Pa. 619; Ward v. Suter, 70 Tex. 343.

Malicious Holding to Bail. — Steer v. Scoble, Cro. Jac. 667; Berry v. Adamson, 6 B. & C. 528; Small v. Gray, 2 C. & P. 605 *Accord*. — Ed.

oath before a justice of the peace, that they had absconded to the injury of their creditors, as he verily believed, and thereupon sued out of the Court of Common Pleas, a writ of attachment, and caused the said property to be seized by the sheriff, and held for a long time, whereby the same was injured, the plaintiffs deprived of the opportunity of forwarding their goods to a market, and greatly injured. Plea, not guilty.

Upon trial to the jury, the counsel for the plaintiffs *admitted* that the plaintiffs were indebted to the defendant at the time of his affidavit, as sworn to in it; whereupon the court directed a nonsuit, with leave to move to open it, and for a new trial, which is now made.

Geo. B. Smythe, and H. H. Hunter, for plaintiffs.

T. Ewing, H. Stanberry, and J. R. Stanberry, for the defendant.¹

By the Court, Wood, J. The only question presented in this motion is, do the facts set forth in the declaration constitute a legal cause of action, provided the plaintiffs were indebted to the defendant, when he sued out the writ of attachment?

In Connecticut, there is a statute which provides, that where a plaintiff shall "willingly and wittingly" wrong any defendant by prosecuting any action against him with intent wrongfully to trouble and vex him, such plaintiff shall pay treble damages for the first offence, be liable to a fine for the second, and for the third, may be proceeded against as a common *barrator*. Judge Swift thinks the act founded in the clearest principles of justice.² At common law, it seems well settled, that no action will lie for a *malicious* prosecution of a *civil* suit, *without* cause, where there is no arrest.³ The costs allowed in all other cases are supposed to be a sufficient compensation for the injury, however malicious. The rule itself may perhaps be admitted, but *the reason* on which it is said to be founded cannot be so readily admitted, for at common law *no costs were allowed*. If the plaintiff failed, he was amerced for his *false clamor*, and if he succeeded, the defendant was at the mercy of the King. But at common law, whenever there was an arrest, holding to bail, or imprisonment, where *no debt was due, or for a greater sum than was due*, with a malicious intention to injure, the action lay for a *malicious arrest*.⁴ The action for a *malicious prosecution*, which technically only applies to cases of malicious prosecution of criminal complaints, lies as well where there is *not*, as where there is an *arrest*; and the grounds of the action are the *malice* of the defendant, want of *probable cause*, and injury to the plaintiff's person by imprisonment, his reputation by scandal, or to his property by expense.⁵ Having no *direct* adjudication on the question before us, we may look to the analogies of the law. The counsel for the defendant insist that because the plaintiffs' indebtedness to the defendant in the former suit is admitted, there *was*

¹ The arguments of counsel are omitted. — Ed.

² Swift Dig. 493.

⁴ 1 Saund. R. 228.

³ 1 Salk. R. 14.

⁵ 1 Swift Dig. 491.

probable cause for suing out the writ of attachment. This does not seem to us to follow. To constitute probable cause for suing out a writ of attachment, the law requires an affidavit of indebtedness, and also that the debtor has absconded, or is non-resident. The absence of either is absence of *probable cause* for the writ, and the false affirmation of either fact, *knowingly*, as a means of procuring the writ, shows express malice, whilst the taking of property without cause is a sufficient injury to sustain the action.

In the Supreme Court of New York, it has been decided, that case would lie against both plaintiff and defendant, for fraudulently setting up the judgment as *unsatisfied*, when in fact paid, and causing an execution and sale of land once held by it as a lien, but which had been afterwards conveyed by the defendant to a third person. The court in that case say, "If it appear that the unlawful acts of the defendant occasioned trouble, inconvenience, or expense to the plaintiff, this action lies." The general rule is, that for *every* injury the law gives redress; and it would be a reproach to the administration of justice, if one, by perjury, could take from another the control of his property, under *form of law*, and the law afford no remedy. Nice technicalities are sometimes applied to get rid of a *hard case*; but when, under *form of law*, opportunity is sought to gratify malice, to the injury of another, courts will not be astute to *avoid*, but rather seek ground to *sustain* an action. We have no *facts* in this case, before us, but the statement in the declaration, and the *admission* of indebtedness; but these show a sufficient *prima facie* cause of action, and cause for opening up the nonsuit. *New trial granted.*¹

¹ *Malicious Seizure of Property on Civil Process.* — Sanders v. Powell, 1 Lev. 129, 1 Sid. 183, 1 Keb. 603, s. c.; Craig v. Hasell, 4 Q. B. 481; Medina v. Grove, 10 Q. B. 152; Redway v. McAndrew, L. R. 9 Q. B. 74; Kirksey v. Jones, 7 Ala. 622; Juchter v. Boehmer, 67 Ga. 534; Wilcox v. McKenzie, 75 Ga. 73; Lawrence v. Hagerman, 56 Ill. 68; Spaid v. Barrett, 57 Ill. 239; Western Co. v. Wilmarth, 33 Kans. 510; Willis v. Noyes, 12 Pick. 324; Savage v. Brewer, 16 Pick. 453; O'Brien v. Barry, 106 Mass. 300; Bobsin v. Kingsbury, 138 Mass. 538; Grant v. Reinhart, 33 Mo. Ap. 74; Smith v. Smith, 56 How. Pr. 316; Fortman v. Rottier, 8 Ohio St. 548; Summer v. Wilt, 4 S. & R. 19; Mayer v. Walter, 64 Pa. 283 *Accord*.

Malicious Issue of an Injunction. — Munce v. Black, 7 Ir. C. L. R. 475; McFarlane v. Garrett, (Del. 1900) 49 Atl. R. 175; Landis v. Wolf, (Ill. 1903) 69 N. E. R. 103; Manlove v. Vick, 55 Miss. 567; Burt v. Smith, 84 N. Y. Ap. Div. 47; Coal Co. v. Upson, 40 Ohio St. 17; Hess v. Oreg. Co., (Oreg., 1900) 60 Pac. R. 1011; Batson v. Paris Co., (S. Ca. 1906) 53 S. E. R. 500; Williams v. Ainsworth, 121 Wis. 600 (*semble*) *Accord*.

Malicious Procurement of the Execution of a Search Warrant. — Cooper v. Booth, 3 Esp. 144, s. c. 1 T. R. 535 (*cited*); Elsee v. Smith, 2 Chit. R. 304, 1 D. & R. 97 s. c.; Wyatt v. White, 29 L. J. Ex. 193; Carey v. Sheets, 60 Ind. 17, 67 Ind. 375; Whitson v. May, 71 Ind. 269; Olson v. Trete, 46 Minn. 225; Miller v. Brown, 3 Mo. 127, 131; Boeger v. Langenberg, 97 Mo. 390 *Accord*.

See also Hope v. Evered, 17 Q. B. D. 338; Lea v. Charrington, 23 Q. B. Div. 45; Utting v. Berney, 5 Times L. R. 39. — Ed.

JENINGS v. FLORENCE.

IN THE COMMON PLEAS, JUNE 12, 1857.

[Reported in 2 Common Bench Reports, New Series, 467.]

COCKBURN, C. J., delivered the judgment of the court: ¹—

This was an action for maliciously and without reasonable or probable cause causing the plaintiff to be arrested under a writ of execution issued upon a judgment obtained by the defendant against the plaintiff, and upon which the defendant, as the declaration alleges, maliciously and without reasonable or probable cause indorsed a direction to levy the whole amount recovered by the judgment, whereas, a portion of that amount had been previously satisfied: and the declaration proceeds to allege, as damage caused by the arrest for the greater amount, that the plaintiff was, after he was taken, during his detention, and before his discharge, able and willing and offered to pay, and always afterwards during his detention was willing to pay, and was finally discharged from imprisonment upon paying, and discharged the judgment by paying, the smaller sum; and that the plaintiff, by reason of the premises, was necessarily put to and incurred divers costs and expenses in and about his maintenance during the said detention, and in and about obtaining his discharge as aforesaid. To this declaration the defendant demurred; and the case was argued on his behalf by *Mr. Manisty*, who admitted the authority of the case of *Churchill v. Siggers*,² where the Court of Queen's Bench, in an elaborate judgment, held an action to be maintainable for a malicious arrest without reasonable or probable cause for more than remained due upon the judgment, as in the present case, special damage being shown to have been sustained by the plaintiff in consequence of such arrest. He, however, insisted that such damage was not sufficiently shown by the declaration in the present case.

We are, however, of opinion that special damage is sufficiently alleged. It would not be competent for the plaintiff at the trial to obtain a verdict by proving merely that he was arrested and kept in custody for a greater amount than was due, however improperly indorsed; but he must also prove, that, by reason of the arrest and detention for the larger sum, his imprisonment was prolonged, or the expense of obtaining his discharge increased.

Judgment must, therefore, be for the plaintiff.

*Judgment for the plaintiff.*³

¹ Only the opinion of the court is given. — ED.

² 3 Ellis & B. 929.

³ *Churchill v. Siggers*, 3 E. & B. 929; *Gilding v. Eyre*, 10 C. B. N. S. 592; *Summer v. Wilt*, 4 S. & R. 19; *Davis v. Clough*, 8 N. H. 157 *Accord*.

See *Huffer v. Allen*, L. R. 2 Ex. 15.

But a malicious seizure under a distress of a proper amount of goods, although under a claim of more than is due, is justifiable. *Stevenson v. Newnham*, 13 C. B. 285. — ED.

SECTION V.

*Malicious Institution of a Civil Action without Arrest or Attachment.*WETMORE ^X v. MELLINGER ^B AND ANOTHER.

IN THE SUPREME COURT, IOWA, APRIL 9, 1884.

[Reported in 64 Iowa Reports, 741.]

BECK, J.¹ The petition alleges that defendants brought an action against plaintiff and his wife, charging in the petition that they two conspired and confederated together to defraud defendants, by representing to defendants, under the assumed name of Baker, that they were the owners of certain lands in Poweshiek County, which defendants were induced to purchase of plaintiff and his wife, who, in such assumed name, executed to defendants a warranty deed therefor; that, in an action by one Woodward, a deed, purporting to be executed by him to the Bakers, under which they claimed title to the lands, was declared to be void, for the reason that it was forged and fraudulent, and that plaintiff herein and his wife well knew the condition of their title, and representing that they were the owners thereof, for the purpose of cheating defendants, and of obtaining money by false and fraudulent pretences, and did, in that manner, obtain the sum of \$3,000 from defendants. It is further alleged that defendants herein served out a writ of attachment in the suit brought by them, which was levied upon real estate owned by plaintiff's wife, and that defendants for a time prosecuted their action, but finally dismissed it at their own costs. Plaintiff, in his petition in this case, alleges that he was not indebted to defendants in any sum at the time their action was brought against him; that he was not guilty of the frauds therein charged, and that the action was commenced and prosecuted by defendants maliciously and without probable cause. The defendants, in their answer, admit the commencement of the suit, the issuing of the attachment, and that it was levied upon real estate owned by plaintiff's wife. There was no evidence showing, or tending to show, that the writ of attachment was levied upon any property owned by plaintiff. The wife of plaintiff does not join in this action.

We think the doctrine is well established by the great preponderance of authority that no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of defendant, and no special injury sustained, which would not necessarily result in all suits prosecuted to recover for like causes of action.

¹ Only the opinion of the court on this point is given. — Ed.

See 1 Am. Leading Cases, p. 218, note to *Munn v. Dupont et al.*, and cases there cited; *Mayer v. Walter*; ¹ *Kramer v. Stock*; ² *Bitz v. Meyer*; ³ *Eberly v. Rupp*; ⁴ *Gorton v. Brown*; ⁵ *Woodmansie v. Logan*; ⁶ *Parker's Adm'rs v. Frambes*; ⁷ *Potts v. Imlay*.⁸

This doctrine is supported by the following considerations: The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from failure in his action, which would keep him from the courts. He ought not, in ordinary cases, to be subject to a suit for bringing an action, and be required to defend against the charge of malice and the want of probable cause. If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it.

It will be observed that the statement of the doctrine we have made extends it no farther than to cases prosecuted in the usual manner, where defendants suffer no special damages or grievance other than is endured by all defendants in suits brought upon like causes of action. If the bringing of the action operates to disturb the peace, to impose care and expense, or even to cast discredit and suspicion upon the defendant, the same results follow all actions of like character, whether they be meritorious, or prosecuted maliciously and without probable cause. They are incidents of litigation. But if an action is so prosecuted as to entail unusual hardship upon the defendant, and subject him to special loss of property or of reputation, he ought to be compensated. So, if his property be seized, or if he be subjected to arrest by an action maliciously prosecuted, the law secures to him a remedy. In the case at bar, the pleadings and evidence show no such special damages. No action could be prosecuted to recover money fraudulently obtained, in which the defendant would not suffer the very things for which plaintiff in this case seeks compensation in damages.

Counsel for plaintiff, in support of their position that the action may be maintained, though no arrest of defendant or seizure of property be had in the proceeding alleged to have been maliciously prosecuted, cite *Green v. Cochran*,⁹ and *Moffatt et al. v. Fisher*.¹⁰ In the first case, the action alleged to be malicious was a proceeding for bastardy, which, under the statute, operated as a lien upon defendant's lands from the commencement. In the other case, the action which was the foundation of plaintiff's claim was forcible entry and detainer, and, before

¹ 64 Pa. St. 289.

² 11 Vroom, 252, s. c. 29 Am. Rep. 233.

³ 27 Ill. 489.

⁴ Id. 156.

⁵ 43 Iowa, 544.

⁶ 10 Watts, 115.

⁷ 90 Pa. St. 259.

⁸ 2 N. J. L. 93 (1 Pen.).

⁹ 4 N. J. L. 330 (1 South.).

¹⁰ 47 Id. 473.

final disposition thereof, the defendant was ousted of possession of the land, whereon was a coal mine. In both instances the property of the respective defendants was reached by the proceedings. The facts of these cases are not within the rule we have stated, and do not support counsel's position.

*Affirmed.*¹

¹ *Savile v. Roberts*, 1 Ld. Ray. 378; *Purton v. Honnor*, 1 B. & P. 205; *Cotterell v. Jones*, 11 C. B. 713; *Quartz Co. v. Eyre*, 11 Q. B. Div. 674; *Ray v. Law*, Pet. C. C. 207; *Tamblyn v. Johnston*, 126 Fed. 267, 270; *Mitchell v. South Western Co.*, 75 Ga. 398 (but see *Slater v. Kimbro*, 91 Ga. 217); *Smith v. Mich. Co.*, 175 Ill. 619; *Bonney v. King*, 201 Ill. 47; *Wetmore v. Mellinger*, 64 Iowa, 741; *Smith v. Hintrager*, 67 Iowa, 109; *Cattle Co. v. Nat. Bank*, 127 Iowa, 153, 158; *Cade v. Yocum*, 8 La. An. 477; *McNamee v. Minks*, 49 Md. 122; *Sup. Lodge v. Unverzagt*, 76 Md. 104 (see *Clements v. Odorless Co.*, 67 Md. 461); *Woodman-sie v. Logan*, 1 Penningt. 93; *Potts v. Imlay*, 1 South. 330; *State v. Meyer*, 40 N. J. 322; *Ely v. Davis*, 111 N. Ca. 24 (*semble*); *Terry v. Davis*, 114 N. Ca. 31; *Cincinnati Co. v. Bruck*, 61 Oh. St. 489 (explaining *Pope v. Pollock*, 46 Oh. St. 367); *Kramer v. Stock*, 10 Watts, 115; *Mayer v. Walter*, 64 Pa. 233; *Muldoon v. Rickey*, 103 Pa. 110; *Emerson v. Cochran*, 111 Pa. 619, 622; *Michell v. Donanski*, 28 R. I. 91, 97 (*semble*); *Smith v. Adams*, 27 Tex. 30; *Johnson v. King*, 64 Tex. 226; *Nowotny v. Grona*, 44 Tex. Civ. Ap. 325; *Abbott v. Thorne*, 34 Wash. 692; *Luby v. Bennett*, 111 Wis. 613 (*semble*); *Cross v. Comm. Agency*, 18 N. Zeal. L. R. 153 *Accord*.

Burnap v. Albert, Fed. Cas. No. 2170; *Cooper v. Armour*, 42 Fed. 215, 217; *Wade v. Nat. Bank*, 114 Fed. 377; *Eastin v. Stockton Bank*, 66 Cal. 123; *Berson v. Ewing*, 44 Cal. 89; *Hoyt v. Macon*, 2 Colo. 113 (*semble*); *Whipple v. Fuller*, 11 Conn. 583; *Wall v. Toomey*, 52 Conn. 35; *Payne v. Donegan*, 9 Ill. Ap. 566 (*semble*); *Lockenour v. Sides*, *supra*, 565; *McCardle v. McGinley*, 86 Ind. 533; *Whitesell v. Study*, 37 Ind. Ap. 429; *Marbourg v. Smith*, 11 Kans. 554; *Cox v. Taylor*, 10 B. Mon. 17; *Woods v. Finnell*, 13 Bush, 628; *Johnson v. Meyer*, 36 La. An. 333 (*semble*); *Allen v. Codman*, 139 Mass. 136 (*semble*); *Wilson v. Hale*, 178 Mass. 111; *Brand v. Hinchman*, 68 Mich. 590; *Antcliff v. June*, 81 Mich. 477; *McPherson v. Ranyon*, 41 Minn. 524; *O'Neill v. Johnson*, 53 Minn. 439; *Eickhoff v. Fidelity Co.*, 74 Minn. 139; *Brown v. City*, 90 Mo. 377 (*semble*); *Smith v. Burrus*, 106 Mo. 94; *McCormick Co. v. Willan*, 63 Neb. 391; *Pangburn v. Bull*, 1 Wend. 345; *Dempsey v. Mitchell*, 53 How. Pr. 11; *Smith v. Smith*, 20 Hun, 555 (*semble*); *Willard v. Holmes*, 21 N. Y. Sup. 998 (*semble*); (but see *Willard v. Holmes*, 142 N. Y. 492; *Paul v. Fargo*, 84 N. Y. Ap. Div. 9); *Kolka v. Jones*, 6 N. Dak. 461; *Lipscomb v. Shofner*, (Tenn. 1896) 33 S. W. R. 818; *Swepeon v. Davis*, 109 Tenn. 99; *Closson v. Staples*, 42 Vt. 209 *Contra*.

In *Eastin v. Stockton Bank*, *supra*, the court said: "The English cases which deny the right to maintain the action, stand upon the ground that the successful defendant is adequately compensated for the damages he sustains by the costs allowed him by the statute. Those costs, it seems, include the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court. The reason upon which the English rule rests would not, therefore, seem to apply here, where the costs recoverable under the statute are confined to much narrower limits. . . .

"Two other objections made to the maintenance of the action, — first, the claim that if such suits are allowed, litigation will become interminable, because every successful action will be followed by another, alleging malice in the prosecution of the former; and second, that if the defendant may sue for damages sustained by an unfounded prosecution, the plaintiff may equally bring an action when the defendant makes a groundless defence, — are well answered in the article already alluded to [Mr. Lawson's note, 21 A. L. Reg. N. S. 231, 353]: 'To the first objection, it is enough to say that the action will never lie for an unsuccessful prosecution, unless begun and carried on with malice and without probable cause. With the burden of this difficult proof upon him, the litigant will need a very clear case before he will be willing to begin a suit of this character. The second argument fails to distinguish between the position of the parties, plaintiff and defendant, in an action at law. The plaintiff sets the law in motion; if he does so groundlessly and maliciously he is the cause of the defendant's damage. But the defendant stands only on his legal rights — the plaintiff having taken his case to court, the defendant has the privilege of calling upon him to prove it to the satisfaction of the judge or jury, and he is guilty of no wrong in exercising this privilege.'"

JOHN O'BRIEN AND WIFE v. MICHAEL M. BARRY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY, 1871.

[Reported in 106 *Massachusetts Reports*, 300.]

MORTON, J.¹ At the trial, the plaintiffs offered to prove, in substance, the following facts: That the defendant maliciously and without probable cause, having no title to the goods replevied, sued out a writ of replevin against the male plaintiff, and caused the officer to replevy and remove the furniture of the plaintiffs; that he did this for the purpose of injuring the female plaintiff; and that she was thereby greatly injured.² It was admitted that the replevin suit was pending at the time this action was commenced. The question is, whether upon these facts, if proved, this action can be maintained.

It is an action of a novel character, but some of the rules which govern actions for malicious prosecutions apply to it and are decisive of the question raised. If an action of this nature can be maintained at all, it is obvious that it can only be upon proof that the plaintiff in the former action, which is alleged to be malicious, had not a legal cause of action. If he had, it would be his right to enforce it by the remedies provided by law, and he would not be liable for any injuries which might incidentally result, although he acted with malice. In so doing, he commits no unlawful act for which an action will lie against him. *Lindsay v. Larned*; ³ *Randall v. Hazelton*. The question whether Barry had a legal cause of action was involved in, and we think, as between these parties, could only be tried in, the replevin suit. The male plaintiff, being a party to that suit, would be bound by its result. If Barry had recovered a judgment in that suit, this action could not be maintained, because it would thus be conclusively settled that his act in replevying the goods was lawful. Any irregularity in the service of the writ of replevin must be taken advantage of in that suit, or it must be deemed to have been waived. The fact that this suit is for an injury to the wife does not take the case out of the operation of this rule. It is one of the incidents of the marriage relation, that the husband must join in such suit. It is substantially his suit; he can discharge it, and is entitled to the proceeds if judgment is recovered. *Southworth v. Packard*.⁴

In an action for malicious prosecution, the plaintiff must show that the prosecution or suit complained of has been terminated by a judgment in his favor. In that suit only can the question whether the

¹ Only the opinion of the court is given. — Ed.

² The plaintiff was prepared to prove that the furniture removed included the only stove of the male plaintiff, that the day chosen for the removal was one of the coldest days in winter, and that the female plaintiff, as the defendant well knew, was at the time quick with child. — Ed.

³ 17 Mass. 190.

⁴ 7 Mass. 95.

defendant had a good cause of action against the plaintiff be litigated. The reasons of the rule apply with equal force to an action like the present. It is against the policy of the law, that the same questions should be litigated between the same parties in successive suits. At the time this action was commenced, the replevin suit, which is alleged to be malicious and without probable cause, was pending; and a majority of the court is of opinion that, if the plaintiffs can under any circumstances maintain an action of this nature, this fact is decisive against this action. *Johnson v. Shove*.¹ *Exceptions overruled*.²

PECHELL AND OTHERS v. WATSON AND ROGERS.

IN THE EXCHEQUER, MAY 29, 1841.

[*Reported in 8 Meeson & Welsby, 691.*]

CASE. The first count of the declaration stated, that the defendant heretofore, to wit, on 1st January, 1838, contriving and maliciously intending to injure the plaintiffs, and to put them to great vexation and expense, unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit next hereinafter mentioned, did advise and stir up one Richard Hearsey, then being a pauper, to prosecute an action of trespass against the plaintiffs. And the now plaintiffs further say, that by and through such advice and stirring up, the said Richard Hearsey did in fact, without reasonable or probable cause, commence and prosecute the said action of trespass, and that such proceedings were thereupon had, that afterwards, to wit, on &c. [stating a judgment of nonsuit against the plaintiff Hearsey, and a suggestion for double costs to the defendants, as justices of the peace]. Whereby the now plaintiffs were not only put to great trouble and vexation, but were also obliged to pay a large sum, to wit, £600, in and about the defence of the said action; and the said now plaintiffs, by reason of the poverty of the said Richard Hearsey, have hitherto been unable to obtain satisfaction from him for or in respect of the said costs so adjudged to the said plaintiffs in the said suit, &c.

The second count stated, that, before the time of the committing of the grievances by the defendants as thereinafter next mentioned, a certain other action of trespass had been commenced in the Court of our Lady the Queen, &c., wherein one R. Hearsey was plaintiff, and the now plaintiffs were defendants; that at the time of the committing the said

¹ 6 Gray, 498.

² "For maliciously prosecuting a good cause of action in the manner provided by law, for the purpose of recovering damages therein, there is no remedy, because there is no wrong." *Per* Field, J., in *Johnson v. Reed*, 136 Mass. 421, 423. See also *May v. Childress*, 2 Tenn. Ch. 442. — ED.

grievances, &c., the said last-mentioned action was depending in the said court; yet the now defendants, wrongfully, unjustly, and maliciously contriving and intending to injure the now plaintiffs, and to vex, harass, and impoverish them, and to subject them to great and heavy costs and expenses, wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said last-mentioned action on the part and behalf of the said Richard Hearsey, the plaintiff therein, against the now plaintiffs, so being defendants therein as aforesaid; by reason of the committing of which said last-mentioned grievances, the now plaintiffs have been greatly injured, and have been obliged to pay divers large sums of money, amounting &c., in or about their defence of the said action; and which said moneys have become and are wholly lost to the plaintiffs.¹

Plea, Not guilty.

A general verdict was given for the plaintiff on the whole declaration.

In Michaelmas term, *Bompas*, Serjt., for the defendant Watson, moved for a rule to show cause, why the judgment on the verdict found for the plaintiffs should not be arrested. — The first count of the declaration is bad in substance. A has no right of action against B, because B has sued A without reasonable and probable cause; therefore also A has no right of action against a party who has instigated and stirred up B so to sue A. The maintenance of another, where no suit is actually pending, has been held not to be actionable, although it may be indictable.² Neither does the count allege that the defendants knew that Hearsey was a pauper. It is, indeed, alleged that they maliciously instigated him to commence the action; but the word “maliciously” means only from indirect and improper motives, and does not imply personal malice to the plaintiffs. But, inasmuch as the pauper himself would not be liable to an action, so neither can the party who advised or instigated him, unless, indeed, where the circumstances amount to a conspiracy.

The court expressed their opinion that the first count was good, but granted a rule on the other points.³

¹ The statement of the counts is abridged. — Ed.

² Vin. Abr. Maintenance (T. 3).

³ The rule was ultimately discharged, so that the second count also was sustained by the court. In accordance with the decision on this count are *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Goodyear Co. v. White*, 2 N. J. L. J. 150. Compare *Metropolitan Co. v. Pooley*, 10 App. Cas. 210, 217-218. — Ed.

THOMAS FLIGHT v. LEMAN.

IN THE QUEEN'S BENCH, JUNE 9, 1843.

[Reported in 4 Queen's Bench Reports, 883.]

CASE. The second count of the declaration alleged that the defendant heretofore, to wit 1st January, 1838, and on divers &c. between that day and 22d November, 1838, contriving and maliciously intending to injure, harass and damnify plaintiff, and to put him to great vexation, unlawfully and maliciously did advise, procure, instigate and stir up John Thomas to commence and prosecute an action of trespass on the case in the court &c. (Queen's Bench) against the now plaintiff; that by and through such advice, procurement, instigation and stirring-up, John Thomas did in fact afterwards, to wit 4th January, 1838, commence and prosecute the last-mentioned action. The present declaration then set out three counts of a declaration in case at the suit of John Thomas against the defendant, averment of a trial at *nisi prius* at Dorchester, on 18th July, 1838, and that the defendant was then and there acquitted of the premises mentioned to be charged against him by John Thomas. And thereupon afterwards, to wit 22d November, 1838, it was considered, in and by the said court &c., amongst other things, that the said John Thomas be in mercy for his false claim against the now plaintiff defendant in the said last-mentioned action as aforesaid. Whereby the now plaintiff was not only put to great trouble and vexation, but was also obliged to pay, and did in fact pay, a large &c., to wit £800, in and about the defence of the said action.

The defendant pleaded, in effect, that the advice given by him was given in the character of an attorney.

Replication *de injuria*.

Special demurrer. Joinder.

Sir W. W. Follett, Solicitor-General, for the defendant.

Barstow, contra.¹

LORD DENMAN, C. J. The case of *Pechell v. Watson* proceeded on the principle that to maintain an action already commenced was unlawful. That is not here charged; and therefore the count ought to show the ingredients which make the instigation to a suit actionable. The plaintiff has not done this; for, beyond all doubt, the absence of reasonable or probable cause is one such ingredient, in the absence of which it does not appear that the plaintiff has been unlawfully disturbed.

PATTESON, J. I think this declaration is bad, for the reason already given. The case is analogous to that of a complaint of malicious prosecution or arrest; and here, as there, the want of reasonable or probable cause ought to be alleged.

¹ The averments of the court are abridged and the arguments of counsel are omitted.
— ED.

WILLIAMS, J. The averments in this declaration might be sustained by proof that the defendant, not being an attorney, had held a conversation with Thomas, and had said, "If your story is correct, you might sue Flight." No action could be maintained on that, unless it further appeared that the now defendant knew that there was no right to sue the now plaintiff.

COLERIDGE, J. It is not asserted here that the suit maintained was without reasonable or probable cause: there are only general words, imputing an instigation and a stirring-up. There should be added to these, in strict analogy with actions for malicious prosecution or arrest, as my Brother Patteson has pointed out, an averment of want of reasonable or probable cause: and without such averment this declaration shows no right of action. *Judgment for defendant.*¹

¹ *Fivaz v. Nicholls*, 2 C. B. 501, 514 (*semble*); *Grove v. Brandenburg*, 7 Blackf. 234 *Accord*.

"*Pechell v. Watson* came to be considered in *Flight v. Leman*. Its authority was recognized, but the latter case was decided against the plaintiff, who sued for maintenance, on the ground, I own I should have thought the narrow ground, that to instigate a suit was not maintenance, though to support one already instituted was." *Per* COLERIDGE, C. J., in *Bradlaugh v. Newdegate*, 11 Q. B. D. 1, 8. — Ed.

SECTION VI.

Malicious Abuse of Process.

GRAINGER v. HILL AND ANOTHER.

IN THE COMMON PLEAS, JANUARY 20, 1838.

[Reported in 4 Bingham, New Cases, 212.]

TINDAL, C. J.¹ This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendant for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the mean time, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95 17s. 6d., and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained; by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in trover for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgment.

The second ground urged for a nonsuit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same, — that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ; here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to

¹ Only the opinion of the learned Chief Justice upon the point of abuse of legal process is given. — Ed.

such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.¹

¹ Heywood v. Collinge, 9 A. & E. 268; Wicker v. Hotchkiss, 62 Ill. 110 (*semble*); Emery v. Ginnan, 24 Ill. Ap. 65 (*semble*); Whitesell v. Study, 37 Ind. Ap. 429 (*semble*); Page v. Cushing, 38 Me. 523; Wood v. Graves, 144 Mass. 365; White v. Apsley Co., 181 Mass. 339; White v. Apsley Co., 194 Mass. 97; Pixley v. Reed, 26 Minn. 80 (*semble*); Rossiter v. Minn. Co., 37 Minn. 296; Bebinger v. Sweet, 6 Hun, 478; Buffalo Co. v. Everest, 30 Hun, 586 (*semble*); Hazard v. Harding, 63 How. Pr. 326; Prough v. Entriken, 11 Pa. 81; Mayer v. Walter, 64 Pa. 283; Lanson v. Charroux, 18 R. I. 467 *Accord*.

In Wood v. Graves, *supra*, ALLEN, J., said, p. 366: "There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceeding upon the process was justifiable and proper in its inception. Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest for the purpose of extorting money or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act, in accordance with the wishes of those who have control of the prosecution. The leading case upon this subject is Grainger v. Hill, 4 Bing. N. C. 212, where the owner of a vessel was arrested on civil process, and the officer, acting under the directions of the plaintiffs in the suit, used the process to compel the defendant therein to give up his ship's register, to which they had no right. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it, to effect an object not within its proper scope."

In Mayer v. Walter, *supra*, SHARSWOOD, J., said: "There is a distinction between a malicious use and a malicious abuse of legal process. An abuse is where the party employs it for some unlawful object, not the purpose which it is intended by the law to effect; in other words, a perversion of it. Thus, if a man is arrested, or his goods seized in order to extort money from him, even though it be to pay a just claim other than that in suit, or to compel him to give up possession of a deed or other thing of value, not the legal object of the process, it is settled that in an action for such malicious abuse it is not necessary to prove that the action in which the process issued has been determined, or to aver that it was sued out without reasonable or probable cause: Grainger v. Hill, 4 Bing. N. C. 212. It is evident that when such a wrong has been perpetrated, it is entirely immaterial whether the proceeding itself was baseless or otherwise. We know that the law is good, but only if a man use it lawfully.

"On the other hand, legal process, civil or criminal, may be maliciously used so as to give rise to a cause of action where no object is contemplated to be gained by it other than its proper effect and execution. As every man has a legal power to prosecute his claims in a court of law and justice, no matter by what motives of malice he may be actuated in doing so, it is necessary in this class of cases to aver and prove that he has acted not only maliciously, but without reasonable or probable cause. It is clearly settled also, that the proceeding must be determined finally before any action lies for the injury; because, as it is said in Arundell v. Tregon, Yelv. 117, the plaintiff will clear himself too soon, viz., before the fact tried, which will be inconvenient; besides, the two determinations might be contrary and inconsistent."

To proceed unfairly and oppressively but without seeking to compel another to do what he is not obliged to do, e. g. to enter up judgment on a note after 10 P. M. and to bring immediate execution, is not a ground of action according to Docter v. Riedel, 96 Wis. 158. But see dissenting opinion of Marshall, J.

TAMBLYN AND ANOTHER v. JOHNSTON.

CIRCUIT COURT OF APPEALS, UNITED STATES, NOVEMBER 2, 1903.

[126 *Federal Reporter*, 267.]

Before SANBORN, THAYER AND VAN DEVANTER, Circuit Judges.

THAYER, Circuit Judge.¹ The gist of the complaint is that the defendants below, who are the plaintiffs in error here, well knowing that the plaintiff below was only indebted to them in the sum of \$1,974.11, commenced an action against him by attachment in a foreign jurisdiction, charging the indebtedness to be \$5,100, and causing a levy to be made on property of the plaintiff then in transit which was of the value of \$6,600, and that they did so "wrongfully, wantonly, and maliciously," for the purpose of injuring the plaintiff in his good name and credit. We entertain no doubt that the complaint discloses a legal wrong, for which an action will lie. According to the great weight of authority and reason, no action will generally lie for the institution and prosecution of a civil suit, even if it is brought and prosecuted maliciously and without any probable cause. In such cases the liability of the plaintiff for the costs which he thereby incurs is deemed a sufficient penalty for the wrong. But when the plaintiff, who brings such an action, procures the arrest of the defendant or the seizure of his property, under a writ of attachment, and thereby inflicts special damages, such as do not ordinarily result from the institution of a civil suit, a wrong is committed, on account of which the law will afford redress in an action on the case. So, when a plaintiff, having a legitimate demand against a defendant for a small amount, sues him for a sum largely in excess of what he knows to be justly due, and causes an attachment to be levied on property of the defendant of great value, to secure such excessive demand, and does so maliciously, with intent to injure the defendant, rather than to collect what is justly due, a wrong is committed, of which the courts will take cognizance. The law to this effect is comparatively well settled, and it commends itself to our judgment as reasonable and just.² *Austin v. Debnan*; ³ *Savage v. Brewer*; ⁴ *Zinn v. Rice*; ⁵ *Brand v. Hinchman*; ⁶ *Mayer v. Walter*; ⁷ *Wetmore v. Mellinger et al.*; ⁸ *Potts v. Imlay*; ⁹ *Bitz v. Meyer*; ¹⁰ *Marx v. Strauss* (Ala.); ¹¹ *Stiff v. Fisher* (Tex. Sup.); ¹² *Scovill v. Glasner*.¹³

¹ Only a portion of the opinion is given. — Ed.² *Mills v. Lawrence*, 217 Ill. 446; *Sommer v. Wilt*, 4 S. & R. 19 *Accord.* — Ed.*Savage v. Brewer*, 16 Pick. 453; *Paul v. Fargo*, 84 N. Y. Ap. Div. 9.³ 3 Barn. & Cressw. 143.⁴ 16 Pick. 453, 28 Am. Dec. 255.⁵ 154 Mass. 1, 27 N. E. 772, 12 L. R. A. 288.⁶ 68 Mich. 590, 36 N. W. 664, 13 Am. St. Rep. 362.⁷ 64 Pa. 283.⁸ 64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465.⁹ 4 N. J. Law, 330, 334, 7 Am. Dec. 603.¹⁰ 40 N. J. Law, 252, 29 Am. Rep. 233.¹¹ 9 South. 818, 820.¹² 23 S. W. 577.¹³ 79 Mo. 449, 460.

SECTION VII

Unauthorized Action in the Name of Another.

JAMES BOND v. JOSEPH CHAPIN.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER, 1844.

[Reported in 8 Metcalf, 31.]

HUBBARD, J.¹ In the present suit, which is an action on the case against the defendant for prosecuting a suit in the name of Thomas Bond against the plaintiff, the plaintiff avers, in his declaration, (which accompanies the exceptions,) that the defendant, without authority from said Thomas, and having no reasonable ground for believing that anything was due from the plaintiff to him, attached the plaintiff's property, and prosecuted said suit against him, from November term, 1840, to November term, 1841, when he became nonsuit; and evidence was offered tending to prove these allegations. The instructions to the jury were, that "the plaintiff must prove the former action to have been commenced and prosecuted maliciously, that is to say, with some improper motive, or without due care to ascertain his rights, as well as without authority, and without probable cause." The error complained of may have arisen from not distinguishing, during the trial, between an action on the case for malicious prosecution, and an action on the case for prosecuting a suit in the name of a third person, without authority, by reason of which the defendant sustains injury.

In a suit for malicious prosecution, the gist of the action is malice; but there must also exist the want of probable cause. And without the proof of both facts, the action cannot be maintained, though the existence of malice may often be inferred from the want of probable cause. But in an action on the case for damages for prosecuting a suit against the plaintiff without authority, in the name of a third person, the gist of the action is not a want of probable cause, — for there may be a good cause of action, — but for the improper liberty of using the name of another person in prosecuting a suit, by which the defendant in the action is injured. Nor is the proof of malice essential to the maintenance of such action. If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and acted upon that supposition, without malice, still if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him, in the loss

Only the opinion of the court is given. — Ed.

of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives — which may be inferred from there existing no right of action, as well as proved in other ways — then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation.

In this case, the learned judge having instructed the jury that a want of probable cause and malice must concur with the want of authority to commence the suit in the name of a third person, to enable the plaintiff to maintain the action, we think there was error in the instruction, and that though the damages might be enhanced by showing malice and a want of probable cause, yet that the proof of them is not essential to the maintenance of the action.

*New trial granted.*¹

¹ Y. B. 7 Hen. VI. 43, pl. —; 1 Roll. Ab. 101, pl. 1, s. c.; *Holliday v. Sterling*, 62 Mo. 321 *Accord.* — Ed.

CHAPTER V.¹

WHETHER THERE IS A RIGHT TO PRIVACY.

ROBERSON *v.* ROCHESTER FOLDING BOX COMPANY.1902. 171 *New York*, 538.²

PARKER, C. J. The Appellate Division³ has certified that the following questions of law have arisen in this case, and ought to be reviewed by this court: 1. Does the complaint herein state a cause of action at law against the defendants or either of them? 2. Does the complaint herein state a cause of action in equity against the defendants or either of them? These questions are presented by a demurrer to the complaint, which is put upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

As a demurrer admits not only those facts which are expressly alleged in the complaint, but everything which can be implied by fair and reasonable intendment from its allegations (*Marie v. Garrison*, 83 N. Y. 14, 23), we are to inquire whether the complaint, regarded from the standpoint of this rule, can be said to show any right to relief either in law or in equity.

The complaint alleges that the Franklin Mills Co., one of the defendants, was engaged in a general milling business and in the manufacture and sale of flour; that before the commencement of the action, without the knowledge or consent of plaintiff, defendants, knowing that they had no right or authority so to do, had obtained, made, printed, sold, and circulated about 25,000 lithographic prints, photographs and likenesses of plaintiff, made in a manner particularly set up in the complaint; that upon the paper upon which the likenesses were printed and above the portrait there were printed, in large, plain letters, the words, "Flour of the Family," and below the portrait in large capital letters, "Franklin Mills Flour," and in the lower right-hand corner in smaller capital letters, "Rochester Folding Box Co., Rochester, N. Y."; that upon the same sheet were other advertisements of the flour of the Franklin Mills Co.; that those 25,000 likenesses of the plaintiff thus ornamented have been conspicuously posted and displayed in stores, warehouses, saloons, and other public places; that they have been recognized by friends of the plaintiff and other people, with the result that plaintiff has been greatly humiliated by the scoffs and jeers of persons who have recognized her face and picture on this advertisement and her good name has been attacked,

¹ [The present (third) edition of Vol. 1 was prepared by Professor Ames up to page 619, when further labor was prevented by the illness which terminated in his death on Jan. 8, 1910.]

After page 619 the changes in this volume from the second edition were mostly made by the editor of Vol. 2. — J. S.]

² Arguments omitted. — Ed.

³ The decision of the Appellate Division, overruling demurrer to complaint, is reported in 64 App. Div. 30. — Ed.

causing her great distress and suffering both in body and mind; that she was made sick and suffered a severe nervous shock, was confined to her bed and compelled to employ a physician, because of these facts; that defendants had continued to print, make, use, sell, and circulate the said lithographs, and that by reason of the foregoing facts plaintiff had suffered damages in the sum of \$15,000. The complaint prays that defendants be enjoined from making, printing, publishing, circulating, or using in any manner any likenesses of plaintiff in any form whatever, for further relief (which it is not necessary to consider here) and for damages.

It will be observed that there is no complaint made that plaintiff was libelled by this publication of her portrait. The likeness is said to be a very good one, and one that her friends and acquaintances were able to recognize; indeed, her grievance is that a good portrait of her, and, therefore, one easily recognized, has been used to attract attention toward the paper upon which defendant mill company's advertisements appear. Such publicity, which some find agreeable, is to plaintiff very distasteful, and thus, because of defendants' impertinence in using her picture without her consent for their own business purposes, she has been caused to suffer mental distress where others would have appreciated the compliment to their beauty implied in the selection of the picture for such purposes; but as it is distasteful to her, she seeks the aid of the courts to enjoin a further circulation of the lithographic prints containing her portrait made as alleged in the complaint, and as an incident thereto, to reimburse her for the damages to her feelings, which the complaint fixes at the sum of \$15,000.

There is no precedent for such an action to be found in the decisions of this court; indeed, the learned judge who wrote the very able and interesting opinion in the Appellate Division said, while upon the threshold of the discussion of the question: "It may be said in the first place that the theory upon which this action is predicated is new, at least in instance if not in principle, and that few precedents can be found to sustain the claim made by the plaintiff, if indeed it can be said that there are any authoritative cases establishing her right to recover in this action." Nevertheless, that court reached the conclusion that plaintiff had a good cause of action against defendants, in that defendants had invaded what is called a "right of privacy" — in other words, the right to be let alone. Mention of such a right is not to be found in Blackstone, Kent, or any other of the great commentators upon the law, nor so far as the learning of counsel or the courts in this case have been able to discover, does its existence seem to have been asserted prior to about the year 1890, when it was presented with attractiveness and no inconsiderable ability in the Harvard Law Review (Vol. IV, page 193) in an article entitled "The Right of Privacy."

The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enter-

Yea!

prises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals, or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise. While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity, and that the publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera, will be restrained in equity, on the ground that an individual has the right to prevent his features from becoming known to those outside of his circle of friends and acquaintances.

If such a principle be incorporated into the body of the law through the instrumentality of a court of equity, the attempts to logically apply the principle will necessarily result, not only in a vast amount of litigation, but in litigation bordering upon the absurd, for the right of privacy, once established as a legal doctrine, cannot be confined to the restraint of the publication of a likeness, but must necessarily embrace as well the publication of a word picture, a comment upon one's looks, conduct, domestic relations, or habits. And were the right of privacy once legally asserted, it would necessarily be held to include the same things if spoken instead of printed, for one, as well as the other, invades the right to be absolutely let alone. An insult would certainly be in violation of such a right, and with many persons would more seriously wound the feelings than would the publication of their picture. And so we might add to the list of things that are spoken and done day by day which seriously offend the sensibilities of good people, to which the principle which the plaintiff seeks to have imbedded in the doctrine of the law would seem to apply. I have gone only far enough to barely suggest the vast field of litigation which would necessarily be opened up should this court hold that privacy exists as a legal right enforceable in equity by injunction, and by damages where they seem necessary to give complete relief.

The legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture or the name of another for advertising purposes without his consent. In such event no embarrassment would result to the general body of the law, for the rule would be applicable only to cases provided for by the statute. The courts, however, being without authority to legislate, are required to decide cases upon principle, and so are necessarily embarrassed by precedents created by an extreme, and, therefore, unjustifiable application of an old principle.

The court below properly said that "while it may be true that the fact that no precedent can be found to sustain an action in any given case is cogent evidence that a principle does not exist upon which the right may be based, it is not the rule that the want of a precedent is a sufficient reason for turning the plaintiff out of court," provided — I think should be added — there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it or which by analogy or parity of reasoning ought to govern it.

It is undoubtedly true that in the early days of chancery jurisdiction in England the chancellors were accustomed to deliver their judgments without regard to principles or precedents, and in that way the process of building up the system of equity went on, the chancellor disregarding absolutely many established principles of the common law. "In no other way," says Pomeroy, "could the system of equity jurisprudence have been commenced and continued so as to arrive at its present proportions." (Pomeroy's Eq. Jur. sect. 48.) In their work the chancellors were guided not only by what they regarded as the eternal principles of absolute right, but also by their individual consciences; but after a time when "the period of infancy was passed and an orderly system of equitable principles, doctrines, and rules began to be developed out of the increasing mass of precedents, this theory of a personal conscience was abandoned; and 'the conscience,' which is an element of the equitable jurisdiction, came to be regarded, and has so continued to the present day, as a metaphorical term, designating the common standard of civil right and expediency combined, based upon general principles and limited by established doctrines to which the court appeals, and by which it tests the conduct and rights of suitors — a juridical and not a personal conscience." (Pomeroy's Eq. Jur. sect. 57.)

The importance of observing the spirit of this rule cannot be overestimated, for, while justice in a given case may be worked out by a decision of the court according to the notions of right which govern the individual judge or body of judges comprising the court, the mischief which will finally result may be almost incalculable under our system which makes a decision in one case a precedent for decisions in all future cases which are akin to it in the essential facts.

So in a case like the one before us, which is concededly new to this court, it is important that the court should have in mind the effect upon future litigation and upon the development of the law which would necessarily result from a step so far outside of the beaten paths of both common law and equity, assuming — what I shall attempt to show in a moment — that the right of privacy as a legal doctrine enforceable in equity has not, down to this time, been established by decisions.

The history of the phrase "right of privacy" in this country seems to have begun in 1890 in a clever article in the Harvard Law Review — already referred to — in which a number of English cases were ana-

lyzed, and, reasoning by analogy, the conclusion was reached that — notwithstanding the unanimity of the courts in resting their decisions upon property rights in cases where publication is prevented by injunction — in reality such prevention was due to the necessity of affording protection to thoughts and sentiments expressed through the medium of writing, printing, and the arts, which is like the right not to be assaulted or beaten; in other words, that the principle actually involved though not always appreciated, was that of an inviolate personality, not that of private property.

This article brought forth a reply from the *Northwestern Review* (Vol. III, page 1) urging that equity has no concern with the feelings of an individual or with considerations of moral fitness, except as the inconvenience or discomfort which the person may suffer is connected with the possession or enjoyment of property, and that the English authorities cited are consistent with such view. Those authorities are now to be examined in order that we may see whether they were intended to and did mark a departure from the established rule which had been enforced for generations; or, on the other hand, are entirely consistent with it.

[The learned judge then commented upon various English cases; also upon several American cases, especially *Schuyler v. Curtis*, 147 N. Y. 434; *Atkinson v. Doherty*, 121 Mich. 372; and *Corliss v. E. W. Walker Co.*, 57 Fed. Rep. 434. The point *actually decided* in 147 N. Y. 434 and in 121 Mich. 372 was that the widow or relatives of a deceased person cannot restrain the erection of his statue or the publication of his picture. In the *Corliss* case, the court declined to grant the request of a widow that the publication of a biography of her deceased husband should be enjoined; and finally (64 Fed. Rep. 280) declined to restrain the publication of his picture. The latter decision proceeded upon the ground that Mr. Corliss was a public character.]

This distinction between public and private characters cannot possibly be drawn. On what principle does an author or artist forfeit his right of privacy and a great orator, a great preacher, or a great advocate retain his? Who can draw a line of demarcation between public characters and private characters, let that line be as wavering and irregular as you please? In the very case then before the judge, what had Mr. Corliss done by which he surrendered his right of privacy? In what respect did he by his inventions "ask for and desire public recognition" any more than a banker or merchant who prosecutes his calling? Or is the right of privacy the possession of mediocrity alone, which a person forfeits by giving rein to his ability, spurs to his industry, or grandeur to his character? A lady may pass her life in domestic privacy when, by some act of heroism or self-sacrifice, her name and fame fill the public ear. Is she to forfeit by her good deed the right of privacy she previously possessed? These considerations suggest the answer we would make to the position of the learned judge and at the same time serve to make more clear what

we have elsewhere attempted to point out, namely, the absolute impossibility of dealing with this subject save by legislative enactment, by which may be drawn arbitrary distinctions which no court should promulgate as a part of general jurisprudence.

An examination of the authorities leads us to the conclusion that the so-called "right of privacy" has not as yet found an abiding place in our jurisprudence, and, as we view it, the doctrine cannot now be incorporated without doing violence to settled principles of law by which the profession and the public have long been guided.

I do not say that, even under the existing law, in every case of the character of the one before us, or indeed in this case, a party whose likeness is circulated against his will is without remedy. By section 245 of the Penal Code any malicious publication by picture, effigy, or sign which exposes a person to contempt, ridicule, or obloquy is a libel, and it would constitute such at common law. Malicious in this definition means simply intentional and wilful. There are many articles, especially of medicine, whose character is such that using the picture of a person, particularly that of a woman, in connection with the advertisement of those articles might justly be found by a jury to cast ridicule or obloquy on the person whose picture was thus published. The manner or posture in which the person is portrayed might readily have a like effect. In such cases both a civil action and a criminal prosecution could be maintained. But there is no allegation in the complaint before us that this was the tendency of the publication complained of, and the absence of such an allegation is fatal to the maintenance of the action, treating it as one of libel. This case differs from an action brought for libellous words. In such case the alleged libel is stated in the complaint, and if the words are libellous *per se* it is unnecessary to charge that their effect exposes the plaintiff to disgrace, ridicule, or obloquy. The law attributes to them that result. But where the libel is a picture which does not appear in the record, to make it libellous there must be a proper allegation as to its character.

The judgment of the Appellate Division and of the Special Term should be reversed and questions certified answered in the negative, without costs, and with leave to the plaintiff to serve an amended complaint within twenty days, also without costs.

GRAY, J. (dissenting).

In the present case, we may not say that the plaintiff's complaint is fanciful, or that her alleged injury is, purely, a sentimental one. Her objection to the defendants' acts is not one born of caprice; nor is it based upon the defendants' act being merely "distasteful" to her. We are bound to assume, and I find no difficulty in doing so, that the conspicuous display of her likeness, in various public places, has so humiliated her by the notoriety and by the public comments it has

provoked, as to cause her distress and suffering, in body and in mind, and to confine her to her bed with illness.

If it were necessary, to be entitled to equitable relief, that the plaintiff's sufferings, by reason of the defendants' acts, should be serious, and appreciable by a pecuniary standard, clearly, we might well say, under the allegations of the complaint, that they were of such degree of gravity. However, I am not of the opinion that the gravity of the injury need be such as to be capable of being estimated by such a standard. If the right of privacy exists and this complaint makes out a case of its substantial violation, I think that the award of equitable relief, by way of an injunction, preventing the continuance of its invasion by the defendants, will not depend upon the complainant's ability to prove substantial pecuniary damages and, if the court finds the defendants' act to be without justification and for selfish gain and purposes, and to be of such a character, as is reasonably calculated to wound the feelings and to subject the plaintiff to the ridicule, or to the contempt of others, that her right to the preventive relief of equity will follow; without considering how far her sufferings may be measurable by a pecuniary standard.

The right of privacy, or the right of the individual to be let alone, is a personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. (Cooley on Torts, page 29.) The principle is fundamental and essential in organized society that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others. He must so conduct himself, in the enjoyment of the rights and privileges which belong to him as a member of society, as that he shall prejudice no one in the possession and enjoyment of those which are exclusively his. When, as here, there is an alleged invasion of some personal right, or privilege, the absence of exact precedent and the fact that early commentators upon the common law have no discussion upon the subject are of no material importance in awarding equitable relief. That the exercise of the preventive power of a court of equity is demanded in a novel case, is not a fatal objection.

In an article in the Harvard Law Review, of December 15, 1890, which contains an impressive argument upon the subject of the "right of privacy," it was well said by the authors "that the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. . . . The right to life has come to mean the right to enjoy life — the right to be let alone; the right to liberty secures the exercise of extensive

civil privileges ; and the term ' property ' has grown to comprise every form of possession — intangible as well as tangible."

Instantaneous photography is a modern invention and affords the means of securing a portraiture of an individual's face and form *in invitum* their owner. While, so far forth as it merely does that, although a species of aggression, I concede it to be an irremediable and irrepressible feature of the social evolution. But, if it is to be permitted that the portraiture may be put to commercial or other uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property ; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity.

Such a view, as it seems to me, must have been unduly influenced by a failure to find precedents in analogous cases, or some declaration by the great commentators upon the law of a common-law principle which would, precisely, apply to and govern the action ; without taking into consideration that, in the existing state of society, new conditions affecting the relations of persons demand the broader extension of those legal principles, which underlie the immunity of one's person from attack. I think that such a view is unduly restricted, too, by a search for some property, which has been invaded by the defendants' acts. Property is not, necessarily, the thing itself, which is owned ; it is the right of the owner in relation to it. The right to be protected in one's possession of a thing, or in one's privileges, belonging to him as an individual, or secured to him as a member of the commonwealth, is property, and as such entitled to the protection of the law. The protective power of equity is not exercised upon the tangible thing, but upon the right to enjoy it ; and, so, it is called forth for the protection of the right to that which is one's exclusive possession, as a property right. It seems to me that the principle, which is applicable, is analogous to that upon which courts of equity have interfered to protect the right of privacy, in cases of private writings, or of other unpublished products of the mind. The writer, or the lecturer, has been protected in his right to a literary property in a letter, or a lecture, against its unauthorized publication ; because it is property, to which the right of privacy attaches.

(*Woolsey v. Judd*, 4 Duer, 399; *Gee v. Pritchard*, 2 Swanst. 402; *Abernathy v. Hutchinson*, 3 L. J. Ch. 209; *Folsom v. March*, 2 Story, 100.) I think that this plaintiff has the same property in the right to be protected against the use of her face for defendant's commercial purposes, as she would have if they were publishing her literary compositions. The right would be conceded, if she had sat for her photograph; but if her face, or her portraiture, has a value, the value is hers exclusively; until the use be granted away to the public. Any other principle of decision, in my opinion, is as repugnant to equity; as it is shocking to reason. Judge COLT, of the United States Court, in *Corliss v. Walker Co.*, 64 Fed. Rep. 280-285, a case involving the same question of an invasion of the right of privacy, with respect to the publication of a printed likeness of Mr. Corliss, expressed the opinion that "independently of the question of contract, I believe the law to be that a private individual has a right to be protected in the representation of his portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his class, or the revelation of the contents of a merchant's books by a clerk." The case itself is not in point in its facts; because the complainant was the widow of Mr. Corliss, and thus it came within the limitations of *Schuyler v. Curtis*.

The right to grant the injunction does not depend upon the existence of property, which one has in some contractual form. It depends upon the existence of property in any right which belongs to a person.

It would be, in my opinion, an extraordinary view which, while conceding the right of a person to be protected against the unauthorized circulation of an unpublished lecture, letter, drawing, or other ideal property, yet would deny the same protection to a person whose portrait was unauthorizedly obtained, and made use of, for commercial purposes. The injury to the plaintiff is irreparable; because she cannot be wholly compensated in damages for the various consequences entailed by defendants' acts. The only complete relief is an injunction restraining their continuance. Whether, as incidental to that equitable relief, she should be able to recover only nominal damages is not material; for the issuance of the injunction does not, in such a case, depend upon the amount of the damages in dollars and cents.

A careful consideration of the question presented upon this appeal leads me to the conclusion that the judgment appealed from should be affirmed.

O'BRIEN, CULLEN, and WERNER, JJ., concur with PARKER, Ch. J.; BARTLETT and HAIGHT, JJ., concur with GRAY, J.

*Judgment reversed, etc.*¹

¹ [The decision in the *Roberson* case was approved in *Henry v. Cherry*, Rhode Island, 1909, 78 Atl. Rep. 97. In the latter case, the plaintiff's likeness was printed as a part of a mer-

cantile advertisement of "Auto Coats," representing that the coats advertised were similar to that worn by plaintiff in the picture. *Held*, not actionable.

In *Corelli v. Wall*, English Chancery Division, 1906, 22 Times Law Reports, 532, defendant published and sold postcards on which were colored representations of the plaintiff, depicting imaginary incidents in her life. In an action by plaintiff, *SWINFEN EADY, J.*, refused to grant an interlocutory injunction.

In *Pavesich v. New England Life Ins. Co.*, 123 Georgia, 190, the defendant insurance company had printed, as an advertisement in a newspaper, an easily recognizable likeness of the plaintiff, accompanied by a false statement, purporting to be made by the subject of the picture, that he was insured in that company.

Held, actionable.

COBB, J., criticises the majority opinion, and indorses the dissenting opinion, in the *Roberson* case.

In *Edison v. Edison Polyform Mfg. Co.*, New Jersey Court of Chancery, 1907, 67 Atl. Rep. 392, the defendant company was engaged in manufacturing a medicinal preparation. On each bottle was a label, naming the preparation "Edison's Polyform"; also containing a picture of Mr. Edison, and a certificate falsely purporting to be signed by him to the effect that the preparation is compounded according to the formula devised by him.

STEVENS, V. C., *held* that the defendant should be enjoined from holding out, either by certificate or by pictorial representation, that Mr. Edison had any connection with their business.

The learned judge said that the *Roberson* case could not be sustained on principle.

In *Foster-Milburn Co. v. Chinn*, Kentucky, 1909, 120 Southwestern Reporter, 384, a person's picture was published in a patent medicine magazine, and a sketch of him, together with a forged letter purporting to be signed by him and recommending a certain medicine. *Held* (one judge dissenting), that an action would lie.

In *Peck v. Tribune Co.*, 214 U. S. 185, the defendant company published a portrait of the plaintiff in an advertisement of whiskey, in connection with a signed statement purporting to be made by the subject of the portrait, to the effect that she is a nurse, and has used the whiskey for herself and patients, and recommends it. The name under the portrait and also appended to the statement was that of a person other than the plaintiff. *Held*, that an action for libel was maintainable. *HOLMES, J.*, said (p. 190): "It is unnecessary to consider the question as whether the publication of the plaintiff's likeness was a *tort per se*."

See also, as to the existence of a right to privacy, 1 Street, *Foundations of Legal Liability*, 318-321; 1 Cooley, *Torts*, 3d ed., 360-365; 2 *Stephen's History of Criminal Law of England*, 384, 385.

On April 6, 1903, the New York Legislature enacted the following statute:—

NEW YORK LAWS OF 1903. CHAPTER 132.

AN ACT TO PREVENT THE UNAUTHORIZED USE OF THE NAME OR PICTURE OF ANY PERSON FOR THE PURPOSES OF TRADE.

Section 1. A person, firm, or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait, or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 2. Any person whose name, portrait, or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm, or corporation so using his name, portrait, or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries maintained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait, or picture in such manner as is forbidden or declared to be unlawful by this act, the jury, in its discretion, may award exemplary damages.

Section 3. This act shall take effect September first, nineteen hundred and three.

For decisions as to the construction and constitutionality of the above statute, see *Moser v. Press Publ. Co.*, Special Term N. Y. Supreme Court, 1908, 109 N. Y. Supplement, 963; *Wyatt v. McCreery & Co.*, 126 N. Y. App. Div. 650. — *ED.*]

CHAPTER VI.

MALICIOUS INJURY TO THE PLAINTIFF BY INFLUENCING
THE CONDUCT OF A THIRD PERSON.¹

SECTION I.

*By Inducing or Aiding a Third Person to commit a Breach of
a Legal Duty to the Plaintiff.*

(a) THE DUTY OF A SERVANT TO HIS MASTER.

HART v. ALDRIDGE.

IN THE KING'S BENCH, MAY 8, 1774.

[Reported in *Cowper*, 54.]

THIS came before the court on a case reserved upon the following question: Whether under the circumstances of this case the plaintiff was entitled to recover? It was an action of trespass on the case for enticing away several of the plaintiff's servants, who used to work for him in the capacity of journeymen shoemakers. The jury found that Martin and Clayton were employed as journeymen shoemakers by the plaintiff, but for no determinate time, but only by the piece, and had, at the time of the trespass laid, each of them a pair of shoes unfinished; that the defendant persuaded them to enter into his service, and to leave these shoes unfinished, which they accordingly did.

Mr. Darwell, for the plaintiff, stated it to be a question of common law, and that the only point for the opinion of the court was, "whether a journeyman was such a servant as the law takes notice of?" In support of which proposition he insisted that a journeyman is as much a servant as any other person who works for hire or wages; that neither in reason nor at common law is there any distinction between a servant in one capacity or another, and that the injury of seduction is in all cases the same, though the recompense in damages may be different. He pressed the argument *ab inconvenienti*, stating that it would be of great detriment to the town, where the whole trade was in a great measure carried on by this sort of servant. That the verdict had

¹ As to the subjects discussed in Chapters VI, VII, and VIII, see article by J. B. Ames in 18 *Harv. Law Review*, pp. 411-422. — How far an act may be a tort because of the wrongful motive of the actor. — ED.

found the defendant to be apprised of the retainer of the servants, it being in proof that he had desired them to leave their work then in hand unfinished.

Mr. Willes, contra. The single question is, whether the enticing away a journeyman shoemaker, who is hired to make a single pair of shoes, is such an injury to his master as that an action will lie for it. Now the jury have found that there was no hiring for any determinate time, but only by the piece: if so, they could not be the plaintiff's servants; for the term "journeyman" does not import that they belong to any particular master.

LORD MANSFIELD interrupted him. The question is, whether saying that such a one is a man's journeyman, is as much as to say that he is such a man's servant; that is, whether the jury, by finding him to be the plaintiff's journeyman, do not *ex vi termini* find him to be his servant. A journeyman is a servant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finish the work he had undertaken, and the defendant knowingly enticed him to leave it unfinished.

What is the gist of the action? That the defendant has enticed a man away who stood in the relation of servant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might perhaps have been different if the men had taken work for everybody, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own house and took in work for different people, it would be a strong ground to say that he was not the journeyman of any particular master; but the gist of the present action is that they were attached to this particular master.

ASTON, J. It is clear that a master may maintain an action against any one for taking and enticing away his servant, upon the ground of the interest which he has in his service and labor.¹ And even suppos-

¹ *Gunter v. Astor*, 4 Moore, 12; *Hartley v. Cummings*, 5 C. B. 247; *Jones v. Blocker*, 48 Ga. 331; *Wharton v. Joesey*, 46 Ga. 578; *Lee v. West*, 47 Ga. 311 (*semble*); *Smith v. Goodman*, 75 Ga. 198; *Bundy v. Dodsan*, 28 Ind. 295; *Jones v. Tevis*, 4 Litt. 25; *Tyson v. Ewing*, 3 J. J. Marsh, 185; *Carew v. Rutherford*, 106 Mass. 1; *Birby v. Dunlap*, 56 N. H. 456; *Stille v. Jenkins*, 3 Green (N. J.) 302; *Scidmore v. Smith*, 13 Johns. 323; *Covert v. Gray*, 34 How. Pr. 450; *Johnston Co. v. Meinhardt*, 9 Abb. N. C. 393; *Stout v. Woody*, 63 N. Ca. 37; *Haskins v. Royster*, 70 N. Ca. 601; *Robinson v. Culp*, 3 Brev. 302; *Daniel v. Sweeingen*, 6 S. Ca. 297; *Fowler v. Stonum*, 6 Tex. 60; *Thacher Co. v. Burke*, 59 W. Va. 253; *Cowper v. Macfarlane*, (Court of Sess., Feb. 22, 1879) 6 R. 683. *Accord.*

See, also, *Martinez v. Gerber*, 3 M. & G. 88.

An action will lie against one who induces a servant to violate his duty not to communicate the trade secrets of his employer. *Jones v. Westervalt*, 7 Cow. 445; *Kerr v. Roxburgh*, 3 Murr. (Scotland) 126; *Roxburgh v. McArthur*, (Court of Session, Feb. 13, 1841) 3 D. 556. — ED.

ing, as my lord has stated, that the servant did live in his own house, if he were employed to finish a certain number of shoes for a particular person by a fixed time, and a third person enticed him away, I think an action would lie. If not, it might be of very bad consequence in trade. He is a servant *quoad hoc*, and though the seducer and enticer is much the worse, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Justice WILLES and Mr. Justice ASHHURST concurred.

Per Curiam. Let the *postea* be delivered to the plaintiff.

BLAKE v. LANYON.

IN THE KING'S BENCH, APRIL 25, 1795.

[Reported in 6 Term Reports, 321.]

THE second count in the declaration stated that the plaintiff, who was a currier, had hired and retained W. Hobbs to be his servant and journeyman, &c., and that Hobbs, against the will of the plaintiff, departed and left the service of the plaintiff, &c., and then and there went to the defendant; yet the defendant, well knowing Hobbs to be the servant of the plaintiff, and to have been and to be so retained, hired, and employed by the plaintiff, &c., but contriving, &c., "did then and there receive and harbor the said W. Hobbs, and did ... and there retain, keep, and employ the said Hobbs in his (defendant's) said service, and wholly refused to deliver him to the plaintiff his master," although requested, &c., and unlawfully detained, entertained, and kept the said Hobbs, so then being the servant and journeyman of the plaintiff, in his (the defendant's) service, &c., whereby, &c. At the trial at the last Launceston assizes it appeared that Hobbs, who was retained by the plaintiff to work by the piece, left the plaintiff's service on a dispute between them, the plaintiff having beaten him; that at the time of his departure he had some work in hand; that he then applied for work to the defendant, who was also a currier, and who employed him, not knowing of his engagement with the plaintiff; but that, in the course of a few days afterwards, the defendant having been apprised by the plaintiff that Hobbs was his servant and had left his work unfinished, and being threatened with an action in case he continued to employ Hobbs, requested the servant to return to his former master and finish his work. This Hobbs refused, and the defendant continued him in his service. It was objected on behalf of the defendant that the action could not be supported on the second count, because it either imported that the defendant had retained Hobbs in his service, knowing him to be the servant of the plaintiff, which was not established in proof, or that he merely continued Hobbs in his service after he had notice of Hobbs's engagement with the plaintiff, for

which no action could be maintained, it appearing that the defendant did not know that Hobbs was the plaintiff's servant at the time he first employed him. But Lawrence, J., before whom the cause was tried, overruled the objection, saying that the plaintiff might recover upon the second count if the jury were of opinion that the defendant continued to employ Hobbs after he knew that Hobbs was the plaintiff's servant. The jury having given a verdict for the plaintiff,

Gibbs now renewed his objection, stating that great inconveniences would result from a determination against the defendant, for that, in such a case, a person engaged in a great manufacture might be deprived of the benefit of the service of a journeyman whom he had retained to do a particular piece of work, not knowing at the time of hiring that the journeyman was under any engagement with any other master, before the servant had finished his work, and at a moment when the materials then in work might be totally spoiled if left in an unfinished state.

Sed per Curiam. An action will lie for receiving or continuing to employ the servant of another after notice, without enticing him away. Here no fault could be imputed to the defendant for taking Hobbs into his service in the first instance, because then he had no notice of Hobbs's prior engagement with the plaintiff;¹ but, as soon as he had notice of that fact, he ought to have discharged him. A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping out of his former service.

*Rule refused.*²

EAGER v. GRIMWOOD.

IN THE EXCHEQUER, JUNE 1, 1847.

[Reported in 1 *Exchequer Reports*, 61.]

TRESPASS for assaulting and debauching the daughter and servant of the plaintiff, whereby she then became pregnant, &c., and the plaintiff lost and was deprived of her services. Plea: Not guilty.

At the trial before Pollock, C. B., at the London sittings after last Michaelmas term, the following facts appeared: The connection between the defendant and the plaintiff's daughter took place for the

¹ *Eades v. Vandeput*, 5 East, 39 n. (a); *Sherwood v. Hall*, 3 Sumn. 127; *Ferguson v. Tucker*, 2 Har. & G. 182; *Butterfield v. Ashley*, 6 Cush. 249; *Sargent v. Mathewson*, 38 N. H. 54; *Clark v. Clark*, 63 N. J. 1; *Stuart v. Simpson*, 1 Wend. 376; *Caughy v. Smith*, 47 N. Y. 244; *Bell v. Lakin*, 1 McMull. 367; *Conant v. Raymond*, 2 Aik. 243 Accord. — Ed.

² *Fawcett v. Beavres*, 2 Lev. 63; *Pilkington v. Scott*, 15 M. & W. 657; *Kennedy v. McArthur*, 5 Ala. 151; *Dacy v. Gay*, 16 Ga. 203; *Everett v. Sherfey*, 1 Iowa, 356; *Stowe v. Heywood*, 7 All. 218; *Sargent v. Mathewson*, 38 N. H. 54; *Dickson v. Taylor*, 1 Murr. (Scotland) 141 Accord.

Adams v. Bafcauld, 1 Leon. 240; *Caldwell v. O'Neal*, 117 Ga. 775 (if contract is oral only) Contra. — Ed.

first time two days after Christmas-day, 1844. In June, 1845, the plaintiff's daughter gave birth to a child, which, according to the evidence of a surgeon, was a full-grown child. It also appeared that the plaintiff had been put to some expense in consequence of his daughter's illness. The learned Chief Baron left it to the jury to say whether or no the defendant was the father of the child; and he told them that if they believed he was not the father of the child, they should find a verdict for him. The jury having found for the defendant,

Prentice obtained a rule *nisi* for a new trial, on the ground of misdirection, against which

Humfrey showed cause.

Prentice, in support of the rule.¹

POLLOCK, C. B. The case of *Grinnell v. Wells*² is precisely in point. That case decided that an action for seduction cannot be maintained without proof of loss of service. Tindal, C. J., in delivering the judgment of the court, says: "The foundation of the action by a father to recover damages against the wrong-doer, for the seduction of his daughter, has been uniformly placed from the earliest time hitherto, not upon the seduction itself, which is the wrongful act of the defendant, but upon the loss of service of the daughter, in which service he is supposed to have a legal right or interest." The rule must be absolute to enter a nonsuit, unless the plaintiff will consent to a *set processus*.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

*Rule accordingly.*³

¹ The arguments of counsel are omitted. — Ed.

² 7 Man. & G. 1033.

³ "The rule which governs the numerous cases upon this subject is, that where the proximate effect of the criminal connection is an incapacity to labor, by reason of which the master loses the services of his servant, such loss of service is deemed to be the immediate effect of the connection, and entitles the master to his action. The same principle which gives a master an action where the connection causes pregnancy or sexual disease applies to all cases where the proximate consequence of the criminal act is a loss of health resulting in a loss of service. There may be cases in which the seduction, without producing pregnancy or sexual disease, causes bodily injury, impairing the health of the servant, and resulting in a loss of service to her master. So the criminal connection may be accomplished under such circumstances, as, for instance, of violence or fraud, that its proximate effect is mental distress or disease, impairing her health and destroying her capacity to labor. In either of these cases the master may maintain an action, because the loss of service is immediately caused by the connection, as much as in cases of pregnancy or sexual disease. *Vanhorn v. Freeman*, 1 Halst. 322. But if the loss of health is caused by mental suffering, which is not the consequence of the seduction, but is produced by subsequent intervening causes, such as abandonment by the seducer, shame resulting from exposure, or other similar causes, the loss of service is too remote a consequence of the criminal act, and the action cannot be maintained. *Boyle v. Brandon*, 13 M. & W. 738; *Knight v. Wilcox*, 14 N. Y. 413.

"In the case at bar, as the ruling appears to have been general that the action could not be maintained unless pregnancy or sexual disease was proved, we think a new trial should be granted." — *Per* MORTON, J., in *Abrahams v. Kidney*, 104 Mass. 222. See to the same effect *Blagg v. Halsey*, 127 Mass. 191; *Clark v. Clark*, 63 N. J. 1; *White v. Nellis*, 31 N. Y. 406; *Ingersoll v. Miller*, 47 Barb. 47. — Ed.

REDDIE v. SCOOLT.

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 11, 1794.

[Reported in *Peake*, 240.]

TRESPASS for assaulting and debauching Helen Reddie, the plaintiff's daughter and servant, *per quod servitium amisit*.

It appeared that the defendant came frequently to the plaintiff's house, and was received and entertained as a suitor of the daughter. During the time this intimacy continued, the father received an anonymous letter informing him that the defendant was a married man, and a great libertine, and cautioning him against permitting him to be too familiarly acquainted with his daughter. The plaintiff mentioned this letter to the defendant, when he confessed he had a wife still living, but represented her as a woman of so abandoned a character that he could not live with her. He told the plaintiff that they had been parted six years, and at the end of the seventh, he should be able to obtain a divorce, and would then marry his daughter. He added that his wife was worn out with disease, and could not long live. It also appeared that the plaintiff had been warned by another person to break off his acquaintance with the defendant, notwithstanding which he permitted him to continue his visits and to go alone with his daughter to the theatre; the consequence of which was the accident which gave rise to the present action.

LORD KENYON said, that however reprehensible the conduct of the defendant might be, and the unfortunate girl seduced entitled to pity, still it must be recollected that the father was the plaintiff on this record, and if he had misconducted himself, this action could not be maintained. His Lordship thought that the plaintiff had been guilty of gross misconduct in suffering the defendant to continue his visits, after he knew that he was a married man, and had received a caution against admitting him into his family. He therefore found himself obliged to call the plaintiff, though the conduct of the defendant was so gross that he would certainly represent him to the bishop.

The plaintiff was nonsuited.¹

[In the previous edition, a sub-section was here inserted containing cases on "The Duty of a Wife to her Husband." In the Law School for which this volume is specially prepared that topic is now fully dealt with in the course on Persons; and the cases bearing on it are omitted from this selection of cases on Torts.]

¹ *Duberley v. Guning*, 4 T. R. 651; *Woldson v. Larson*, 164 Fed. 543; *Prettyman v. Williamson*, 1 Penn. (Del.) 234; *Vossell v. Cole*, 10 Mo. 636; *Milewaki v. Kurtz*, (N. J. 1908) 71 Atl. R. 107; *Seagar v. Sligerland*, 2 Caines, 219; *Akerley v. Haines*, 2 Caines, 292; *Fletcher v. Randall*, Anthon's N. P. C. 267; *Travis v. Barger*, 24 Barb. 614; *Bunnell v. Greathead*, 49 Barb. 106; *Van Olinda v. Hall*, 88 Hun, 452; *Persch v. Weidman*, 106 N. Y. Ap. Div. 553; *Graham v. Smith*, 1 Edmonds' S. C. N. Y. 267; *Reading v. Gazzam*, 200 Pa. 70. *Accord*.

See also *Verholf v. Van Houwenlengen*, 21 Iowa, 429; *Smith v. Masten*, 15 Wend. 270.—Ed.

SECTION I. (*continued*).

(b) THE DUTY OF A CONTRACTOR.

JOHN ALDRIDGE v. PETER G. STUYVESANT.

IN THE SUPERIOR COURT, CITY OF NEW YORK, OCTOBER, 1828.

[Reported 1 Hall, 210.]

OAKLEY, J.¹ This is a special action on the case. The first count of the declaration sets forth, in substance, that the plaintiff was possessed of the unexpired term of a certain house, and demised the same for one year to certain persons, who entered, and were in the quiet possession of the same as the tenants of the plaintiff: that the defendant knowing that they rightfully so held possession, as tenants of the plaintiff, and *wrongfully and maliciously intending to injure the plaintiff*, came to the premises, and threatened to seize the goods of the tenants then lying on the premises: that by *means of such wrongful and malicious act* of the defendant, he caused the tenants to remove from the premises, whereby the plaintiff lost his tenants; the said premises became vacant and unoccupied for a long period, and the said plaintiff lost the rents and profits of the said house during such period.

The second count states the letting of the premises, as in the first; and the entry and quiet possession of the tenants, and the knowledge of the defendant that they were rightfully in possession, and that the defendant *wrongfully and maliciously* intending to injure the plaintiff, threatened to seize the goods of the tenants living on the premises, if they did not remove from the same: by means of which he caused the tenants to abandon the possession, and the plaintiff thereby lost his tenants and his *rents, which he would otherwise have received from the tenants*: that he was unable to procure other tenants for the premises, and that they remained vacant and unoccupied, and *were greatly dilapidated by reason thereof*.

The third count sets forth a *malicious disturbance* of the tenants by the defendant, with the intent to deprive the plaintiff of his tenants, and prevent the occupation of the premises, and then avers, that by means thereof the tenants were obliged to abandon, and did abandon the premises; that the plaintiff thereby lost his tenants and his rents, which he would otherwise have received, and that the said premises remained vacant for a long period, during which they were greatly injured by means of their being so vacant.

To this declaration there is a general demurrer, and the question is whether, in either of the said counts, a sufficient cause of action is disclosed.

It is believed that this is an action of the first impression; but that is no objection to maintaining it, if it appears to fall fairly within established principles.

¹ Only the opinion of the court is given. — Ed.

In Com. Dig. (tit. Action on the Case for Misfeasance, A. 6) it is laid down that if a man threatens the tenants of another, *whereby they depart from their tenures*, an action lies. On referring to 1 Roll. Abr. which is cited in Comyns, and to the Year-Book (9 H. VII. p. 8), it appears that the tenants spoken of were tenants *at will*, who could dissolve their tenancy, or *depart from their tenures* at pleasure.

In the present case, the tenants, being tenants for years, could not, in judgment of law, depart from their tenures, though they might abandon the possession of their premises. The averment in the declaration, therefore, that the plaintiff lost his tenants, does not seem to set forth such an injury or damage as the law can notice. The case, however, in Comyns seems to establish the principle, that if a man, by interference with the tenants of another, or by disturbing or threatening them, causes damage to the landlord, an action will lie against him.

In *Pasley v. Freeman*,¹ it was held that a false affirmation made by the defendant *with the intent to defraud the plaintiff, whereby the plaintiff receives damage*, is the ground of an action, though the defendant is in no way benefited by it, and does not act in collusion with the person who is.

In *Yates v. Joyce*,² the second and third counts of the declaration set forth in substance that the plaintiff had a judgment against A., which was a lien on a certain lot of land; that A. had no other property to satisfy the judgment, and was insolvent; and that the plaintiff caused the said lot to be taken in execution on the judgment. It was then averred, that the defendant knowing the premises, but *intending to defraud the plaintiff* of the recovery of satisfaction of the judgment, demolished certain buildings on the lot, whereby the lot became of less value, and the plaintiff lost the benefit of his judgment to that amount. To these counts in the declaration there was a general demurrer; but the action was sustained. The court said, that the declaration showed, that the plaintiff had sustained damage by the act of the defendant, which he alleged was done fraudulently, and with the intent to injure him. Trespass, say they, will not lie, for the plaintiff was not in possession. If, then, there is any remedy for him, it is in this form of action; and they go on to lay down the general principle as a sound one, that where "the fraudulent misconduct of a party occasions an injury to the private rights of another, he shall be responsible in damages."

In that case, it will be remarked, that the immediate injury done by the defendant, by the destruction of the buildings, was to the *owner* or *possessor* of the land, who might clearly have had his action for the trespass. But the court count on the fraud, that because the defendant knew the plaintiff's right, and the interest he had in the land by virtue of his judgment, and *intended an injury to him*, he should be responsible.

It seems to me that the facts set forth in the declaration in this case,

¹ 3 D. & E. 51.

² 11 Johns. Rep. p. 136.

and particularly in the third count, bring it fairly within the principles established in the cases above alluded to. The plaintiff's allegation substantially is, that the defendant, knowing that he was the rightful possessor by his tenant of the premises in question, *and wrongfully and maliciously intending to injure him*, so disturbed his tenants, that they abandoned the possession, whereby he lost his rent, which he would have received if they had continued in possession, and the premises sustained injury and dilapidation, by reason of being vacant and unoccupied for the remainder of the year. Here is certainly damage to the plaintiff, and it is alleged to have been caused by the wrongful and malicious act of the defendant, committed with a full knowledge that he was violating the plaintiff's rights, and with the intent to injure him. The case seems in all respects to come within the general principle laid down by the court in *Yates v. Joyce*.

It is said, however, that the tenant had no right to abandon the possession of the premises on account of the disturbance by the defendant; and that if the plaintiff had sustained the injury complained of, it is owing to the wrongful act of the tenants, and the plaintiff's remedy is against them. It does not follow, in my judgment, that because the tenants had violated their contract with the plaintiff, and are liable to him for the rent, that the defendant is to be excused from liability. The defendant has wrongfully, and with the intent to injure the plaintiff, caused the tenants to abandon the premises, and the damage, which is the *gist* of the action, is charged directly to his wrongful act towards the plaintiff.

Thus there are in the case *damnum et injuria*, and where these are found united, they always constitute the ground of an action. I am of opinion that the plaintiff is entitled to judgment on the demurrer.

Judgment for the plaintiff on the demurrer, with leave to the defendant to withdraw the same on payment of costs.¹

LUMLEY v. GYE.

IN THE QUEEN'S BENCH, TRINITY TERM, 1853.

[Reported in 2 *Ellis & Blackburn*, 216.]

CROMPTON, J.² The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, whilst the agreement was in full force, and before

¹ Y. B. 14 Ed. IV. 7, pl. 3; Y. B. 9 Hen. VII. 7, pl. 4; Pollock, *Torts* (2d ed.), 212 n. (h) *Accord.* — Ed.

² The statement of case and arguments of counsel are omitted. — Ed.

the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre, and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre; and special damage arising from the breach of Miss Wagner's engagement was then stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of her Majesty's Theatre, to perform at the said theatre for a certain specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his said theatre for profit to the plaintiff in that behalf; and that the defendant, well knowing the premises and with a malicious intention, whilst Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the said employment of the plaintiff, whereby she wrongfully departed from and out of the said service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time; and special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred; and the question for our decision is, Whether all or any of the counts are good in substance?

The effect of the two first counts is, that a person, under a binding contract to perform at a theatre, is induced by the malicious act of the defendant to refuse to perform and entirely to abandon her contract; whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs, in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and *had become and was* the dramatic artiste of the plaintiff for reward to her: and that the defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste; whereby she did depart out of the employment and service of the plaintiff; whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant, within the rule of law which gives an action to the master for the wrongful enticing away of his servant. And it was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. And the law as to enticing servants was said to be

contrary to the general rule and principle of law, and to be anomalous, and probably to have had its origin from the state of society when serfdom existed, and to be founded upon, or upon the equity of, the Statute of Laborers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract, unless some boundary or limits could be pointed out; and that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harboring and keeping him as servant after he has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue; and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties; and I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service not actually continuing, can make any difference. The wrong and injury are surely the same, whether the wrong-doer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after he has planted the first cabbage on the first morning of his service; and I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists. . . .¹

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff, and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment or service, in the present case, was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of

¹ The learned judge here discussed and approved of *Blake v. Lanyon*. — Ed.

action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where there is an unlawful and malicious enticing away of any person employed to give his personal labor or service for a given time under the direction of a master or employer who is injured by the wrongful act; more especially when the party is bound to give such personal services exclusively to the master or employer; though I by no means say that the service need be exclusive. . . .¹

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by Mr. *Cowling* is not tenable, or as saying that in no case except that of master and servant is an action maintainable for *maliciously* inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant. Nor is it an answer, to say that there is a remedy against the contractor, and that the party relies on the contract; for, besides that reason also applying to the case of master and servant, the action on the contract and the action against the malicious wrong-doer may be for a different matter; and the damages occasioned by such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, *with a malicious intent to ruin a rival trader*, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party: I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might perhaps have been maintainable; and, where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action.² In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay anything like the amount of the damage sustained entirely from the wrongful act of the defendant; and it

¹ The rest of the opinion on this point is omitted. — Ed.

² See note (4) to *Skinner v. Gunton*, 1 Wms. Saund. 230.

would seem unjust, and contrary to the general principles of law, if such wrong-doer were not responsible for the damage caused by his wrongful and malicious act. Several of the cases cited by Mr. *Cowling* on this part of the case seem well worthy of attention.

Without however deciding any such more general question, I think that we are justified in applying the principle of the action for enticing away servants to a case where the defendant *maliciously procures* a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services *during the period for which she had so contracted*, whereby the plaintiff was injured.

I think, therefore, that our judgment should be for the plaintiff.

ERLE, J. The question raised upon this demurrer is, Whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time; whereby damage was sustained? And it seems to me that it will. The authorities are numerous and uniform, that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present; for, there, the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed; and the present case is the same. If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle, and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore they are no authority for an action in respect of a contract for such performance; the answer appears to me to be, that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security; he who procures the wrong is a joint wrong-doer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party; and, if he is made to indemnify for such breach, no further recourse is allowed; and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore the action for this wrong, in respect of other contracts than of those hiring, are not numerous; but

still they seem to me sufficient to show that the principle has been recognized. In *Winsmore v. Greenbank* it was decided that the procuring of a breach of the contract of a wife is a cause of action. The only distinction in principle between this case and other cases of contracts is, that the wife is not liable to be sued; but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In *Green v. Button*¹ it was decided that the procuring a breach of a contract of sale of goods by a false claim of lien is an actionable wrong. *Sheperd v. Wakeman*² is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In *Ashley v. Harrison*³ and in *Taylor v. Neri*⁴ it was properly decided that the action did not lie, because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added; at least Lord Mansfield's judgment in *Bird v. Randall*⁵ is to that effect. This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measure of damages is restricted; or in the case of non-payment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and in my

¹ 2 C. M. & R. 707.

² 1 Sid. 79.

³ 1 Peake's N. P. C. 194; a. c. 1 Esp. N. P. C. 48.

⁴ 1 Esp. N. P. C. 386.

⁵ 3 Burr. 1345.

judgment ought to be equally actionable, as the relation of employer and employed is constituted by the contract alone, and no act of service's necessary thereto.

The result is that there ought to be, in my opinion, judgment for the plaintiff.

[The concurring opinion of WIGHTMAN, J., is omitted.]

COLERIDGE, J. It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are these: that in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties, and to damages directly and proximately consequential on the act of him who is sued;¹ that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Laborers, 23 Edw. III., and both on principle and according to authority is limited by it. If I am right in these positions, the conclusion will be for the defendant, because enough appears on this record to show, as to the first, that he, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. Now, to found this, there must be both injury in the strict sense of the word (that is a wrong done), and loss resulting from that injury: the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote and indirect consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavor, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act; but it will neither supply the want of the act itself, or its hurtful consequences: however complete the *injuria*, and whether with malice or without, if the act be after all *sine damno*, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material; and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration, if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff alleges he has sustained. If a contract has been made between A. and B. that the latter should go supercargo for the former on a voyage to China, and C., however maliciously, persuades B. to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made between

¹ Only the opinion of COLERIDGE, J., on this point is given. It is now generally admitted that this learned judge, although *wrong* on this point, was right in maintaining that the actress was not a servant. — ED.

the same parties to go to Sierra Leone, and C. urgently and *bona fide* advises B. to abandon his contract, which on consideration B. does, whereby loss results to A.; I think no one will be found bold enough to maintain that an action would lie against C. In the first case no loss has resulted; the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not C.'s, but entirely and exclusively B.'s own. If so, let malice be added, and let C. have persuaded, not *bona fide* but *mala fide* and maliciously, still, all other circumstances remaining the same, the same reason applies; for it is *malitia sine damno*, if the hurtful act is entirely and exclusively B.'s, which last circumstance cannot be affected by the presence or absence of malice in C. Thus far I do not apprehend much difference of opinion: there would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which Lord Kenyon proceeded in *Ashley v. Harrison*.¹ There the defendant libelled Madame Mara; the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill-treated, forbore to sing for him, though engaged, whereby he lost great profits. Lord Kenyon nonsuited the plaintiff: he thought the defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a *procuring*. In *Winsmore v. Greenbank* the same word was used in the first count of the declaration, which alone is material to the present case; and the Chief Justice, who relied on it, and distinguished it from enticing, defined it to mean "persuading with effect;" and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself. Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading with effect, or effectually or successfully persuading, may no doubt sometimes be actionable — as in trespass — even where it is used towards a free agent; the maxims, *qui facit per alium facit per se*, and *respondeat superior*, are unquestionable; but, where they apply, the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning; the persuader has not

¹ 1 Peake's N. P. C. 194; s. c. 1 Esp. N. P. C. 48.

broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical; but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it. The case itself of *Winsmore v. Greenbank* seems to me to have little or no bearing on the present: a wife is not, as regards her husband, a free agent or separate person; if to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation, trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her; and so, in other counts of the declaration, was it charged in this very case of *Winsmore v. Greenbank*. A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him; and, where this was urged in a case hereafter to be cited,¹ Judge Hankford² gives the answer: the reason is, he says, because the ward is a chattel, and vests in him who has the right. None of this reasoning applies to the case of a breach of contract; if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument *primæ impressionis* is sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight; but, if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried. Now we find a plentiful supply both of text and decision in the case of seduction of servants; and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breach of ordinary contracts? Let this too be considered: that, if by the common law it was actionable effectually to persuade another to break his contract to

¹ Mich. 11 H. 4, fol. 23 A. pl. 46, 2 E. & B. 255.

² William Hankford, Justice of the Common Pleas in 1398, afterwards, in 1414 (1 H. 5), Chief Justice of England.

the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Now upon this the two conflicting cases of *Adams v. Bafeald*¹ and *Blake v. Lanyon* are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another, unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance and, as soon as he knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay; and this reason is given: "The very act of giving him employment is affording him the means of keeping out of his former service." Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service. The true ground on which this action was maintainable, if at all, was the Statute of Laborers, to which no reference was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice; who shall say how much of a free agent's resolution flows from the interference of other minds, or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given *malu fide*, and loss sustained, entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them? According to all legal analogies the *bona fides* of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my loss. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract; why are we not to trace him out? Morally he may be the most guilty. I adopt the arguments of Lord Abinger and my

¹ 1 Leon 240.

brother Alderson in the case of *Winterbottom v. Wright*; ¹ if we go the first step, we can show no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence; they are not of slight importance, and could hardly have been decided without reference to the Courts in Banc. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them. I conclude therefore what occurs to me on the first proposition on which the plaintiff's case rests.

*Judgment for plaintiff.*²

¹ 10 M. & W. 109.

² *Cattle v. Stockton Co.*, L. R. 10 Q. B. 453, 458 (*semble*) *Accord*.

The doctrine of *Lumley v. Gye* as to the malicious procurement of a breach of contract is generally recognized in this country. *Hewitt v. Ontario Co.*, 44 Up. Can. Q. B. 287; *Heaton Co. v. Dick*, 55 F. R. 23, 52 F. R. 667; *Chipley v. Atkinson*, 23 Fla. 206; *Heywood v. Tillson*, 75 Me. 225, 236 (*semble*); *Walker v. Cronin*, *infra*, 694; *Lally v. Cantwell*, 30 Mo. Ap. 524; (See also *McCann v. Wolff*, 28 Mo. Ap. 447); *Van Horn v. Van Horn*, 52 N. J. 284; *Haskins v. Royster*, 70 N. Ca. 601; *Jones v. Stanley*, 76 N. Ca. 355; *Delz v. Winfree*, 80 Tex. 400, 405; *Duffles v. Duffles*, 76 Wis. 374, 377 (*semble*) *Accord*. See also *Carroll v. Falkiner*, *Kerford & Box*, Dig. Victoria Cases, 216.

But see, *contra*, *Boyson v. Thorn*, 98 Calif. 578; *Barron v. Collins*, 49 Ga. 580 (*semble*); *Ashley v. Dixon*, 48 N. Y. 430; *Chambers v. Baldwin*, 91 Ky. 121; *Bourlier v. Macaulay*, 91 Ky. 135.

In *Ensor v. Bolgiano*, 67 Md. 190, the question was left open. The majority of the court thought the question did not arise. Two judges thought otherwise, and favored the rule of *Lumley v. Gye*.

It was decided before the case of *Lumley v. Gye* that an action for slander of title was maintainable where the only special damage laid was the breach by a third person of his contract with the plaintiff. *Green v. Button*, 2 C. M. & R. 707. But see, *contra*, *Kendall v. Stone*, 5 N. Y. 14; *Brentman v. Note*, 3 N. Y. Sup. 420 (N. Y. City Court).

So an action would doubtless lie for defamatory words, not actionable *per se*, which induced a third person to break his contract to marry the plaintiff. — Ed.

[For later American cases where defendant was held liable for inducing a breach of contract, see *Angle v. Chicago & C. R. Co.* 151 N. Y. 1; and compare 307 N. Y. 205, pp. 232, 233; *Raymond v. Yarrington*, 96 Texas, 443; *Brown Narshoure Co. v. Indiana Stove Works*, 96 Texas, 453; *Beekman v. Masters*, 195 Mass. 208; *Motley v. Detroit & C. Co.*, 161 Fed. Rep. 389; *Heath v. American Book Co.*, 97 Fed. Rep. 533; *Tubular & C. Co. v. Exeter & C. Co.*, 159 Fed. Rep. 824; *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Maryland, 556; *Martens v. Reilly*, 109 Wisconsin, 464; *Flaccus v. Smith*, 199 Pa. 128; *Doremus v. Hennessey*, 176 Illinois, 608.

See, *contra*, *Kline v. Eubanks*, 109 La. 241 (*semble*).

As to justification, see *Leonard v. Whetstone*, Indiana Appeals, 68 Northeastern Reporter, 197.

On the general subject, see also *Sweeney v. Smith*, 167 Fed. Rep. 335; *Mahoney v. Roberts*, 86 Arkansas, 130; *Citizens' Light & C. Co. v. Montgomery Light & C. Co.*, 171 Fed. Rep. 553, pp. 560, 561; *McGurk v. Cronenwett*, 199 Mass. 457; *Biggers v. Matthews*, 147 Nor. Car. 299; *Thacher & C. Co. v. Burke*, 59 West Va. 243.]

BOWEN v. HALL AND OTHERS.

IN THE COURT OF APPEAL, FEBRUARY 5, 1881.

[Reported in 6 *Queen's Bench Division*, 333.]

BRETT, L. J.¹ The Lord Chancellor agrees with me in the judgment I am about to read, and it is to be taken therefore as the judgment of the Lord Chancellor as well as of myself.

In this case, we were of opinion at the hearing, that the contract was one for personal service, though not one which established strictly for all purposes the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service, that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson, was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained nevertheless the question, whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of *Lumley v. Gye*. If that case was rightly decided, the objection in this case failed. The only question then which we took time to consider was whether the decision of the majority of the judges in that case should be supported in a Court of Error. That case was so elaborately discussed by the learned judges who took part in it, that little more can be said about it, than whether, after careful consideration, one agrees rather with the judgments of the majority, or with the most careful, learned, and able judgment of Mr. Justice Coleridge. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby v. White*.² If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on

¹ The statement of facts and the dissenting opinion of LORD COLERIDGE, C. J., are omitted. — ED.

² 1 Sm. L. C. (8th ed.) p. 264.

his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognize that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognize what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars v. Wilcocks*¹ requires this doctrine for its support, it is in our opinion wrong.

We are of opinion that the propositions deduced above from *Ashby v. White*² are correct. If they be applied to such a case as *Lumley v. Gye*, the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract, may not be wrongful in law or fact as in the second case put by Coleridge, J.³ But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The technical objections alluded to above have been suggested as the consequences of the judgment in *Vicars v. Wilcocks*.¹ But that judgment when so used or relied on seems to us to be disapproved in the opinions given in the House of Lords in *Lynch v. Knight*,⁴ and seems to us when so used to be unreasonable. In the case of *Lumley v. Gye*, and in the present case, the third condition is fulfilled, namely, that the act of the defendant caused an injury to the plaintiff, unless again it can be

¹ 8 East, 1.² *Supra*, 609.³ 1 Sm. L. C. (8th ed.) p. 264.⁴ 9 H. L. C. 577.

said correctly that the injury is too remote from the cause. But that raises again the same question as has been just dismissed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. That is stated in all the opinions in *Lynch v. Knight*.¹ The injury is in such a case in law as well as in fact a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognized. It follows that in *Lumley v. Gye*, and in the present case, all the conditions necessary to maintain an action on the case are fulfilled.

Another chain of reasoning was relied on by the majority in *Lumley v. Gye*, and powerfully combated by Coleridge, J. It was said that the contract in question was within the principle of the Statute of Laborers, that is to say, that the same evil was produced by the same means, and that as the statute made such means when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employed with regard to parties standing in a similar relation as also wrongful. If, in order to support *Lumley v. Gye*, it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Coleridge, J., upon the second head of his judgment seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the support of the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine. And we are therefore of opinion that the judgment of the Queen's Bench Division was correct, and that the principal appeal must be dismissed.

Appeal dismissed.

BREWER, J., IN ANGLE v. CHICAGO, &c., R. CO.

1894. 151 *United States*, 1, p. 12.

BREWER, J. That this was a wrongful interference on the part of the Omaha Company, and that it resulted directly in loss to the contractor and to the Portage Company, is apparent. It is not an answer to say that there was no certainty that the contractor would have completed his contract, and so earned these lands for the Portage Company. If such a defence were tolerated, it would always be an answer in case of any wrongful interference with the performance of a contract, for there is always that lack of certainty. It is enough that there should be, as there was here, a reasonable assurance, considering all the surroundings, that the contract would be performed in the manner and within the time stipulated, and so performed as to secure the land to the company.

¹ 9 H. L. C. 577.

It certainly does not lie in the mouth of a wrongdoer, in the face of such probabilities as attend this case, to say that perhaps the contract would not have been completed even if no interference had been had, and that, therefore, there being no certainty of the loss, there is no liability.

GLAMORGAN COAL CO., LIMITED, ET ALs. v. SOUTH
WALES MINERS' FEDERATION ET ALs.

1903. *Law Reports* (1903), 2 K. B. 545.¹

1906. *Law Reports* (1906) *Appeal Cases*, 320.

APPEAL by the plaintiffs from the decision of BIGHAM, J. (L. R. 1903, 1 K. B. 118).

The action was brought by the Glamorgan Coal Company, Limited, and seventy-three other plaintiffs, owners of collieries in South Wales, against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, claiming damages for wrongfully and maliciously procuring and inducing workmen employed in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative the plaintiffs sued the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The plaintiffs claimed both damages and an injunction.

The defence consisted of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse. The trial of the action was commenced with a special jury; but ultimately the jury was discharged, and all questions of law and fact, as well as the ascertainment of damages, if any, were by consent left to the determination of the learned judge.

The following facts (*inter alia*) were stated, in substance, by BIGHAM, J., in his written opinion:—

The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men.

For the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement, called the sliding scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal—that is to say, as the price of that coal rises or falls so the rate of wages moves up or down. Clause 23 of the sliding scale agreement is as follows: "It is hereby agreed that all notices to terminate contracts on the part of the employers as

¹ Statement abridged. Arguments omitted; also part of opinions.—Ed.

well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month."

The defendant federation was formed in 1898, and in 1899 was registered under the Friendly Societies Act. Practically all the miners in the South Wales district became members of it. There are about 128,000 members; including all, or very nearly all, the men who work for the plaintiffs. In 1900 the federation was in the possession of funds amounting to 100,000*l*. By its rules its objects are declared to be to provide funds to carry on the business of the federation; taking into consideration the question of trade and wages; to protect workmen generally, and regulate the relations between them and employers; and to call conferences to deal with questions affecting the workmen of a trade, wage, and legislative character.

In November, 1900, the executive council of the federation requested the workmen to hold meetings for the purpose of electing delegates to attend a conference on November 12. Delegates were accordingly elected, and at the conference a resolution was passed authorizing the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally.

On October 23, 1901, a "manifesto" to the workmen was published, stating that it had been resolved that the workmen shall observe as general holidays Friday and Saturday next. Subsequently two other stop-days were ordered, viz.: for October 31 and November 6. (The reasons for issuing the manifesto are stated in the opinion of STIRLING, L. J., *post*.) The result was that the men stayed away from work on the four days, and so broke their contracts with the masters.

The manifesto purported to be issued by the sliding scale committee, and was signed by the members of that committee, who were also members of the executive council of the federation. But in fact the issuing of the manifesto was caused by the executive council of the federation. In truth it was the federation who were acting; the name of the sliding scale committee being used as a blind, with the purpose of securing the funds of the federation from possible liability under the decision in the *Taff Vale Case*, L. R. 1901, App. Cases, 426.

BIGHAM, J., concludes his findings of fact with the following statement:—

"The evidence satisfies me that the action of the federation, and of the other defendants in 1901, was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop-days. Having been requested by the men by the resolution of November 12, 1900, to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion, did to the best of their ability advise and direct the men. Whether they advised them wisely I cannot say, though I am

inclined to think not. But I am satisfied that they advised them honestly, and without malice of any kind against the plaintiffs.

"I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and given. If followed, it involved, as the defendants knew, the breaking of the subsisting contracts. It was followed, as the defendants wished it should be, and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men whom they were advising and directing."

The learned judge gave judgment for the defendants on both branches of the plaintiffs' claim. His opinion is reported in L. R. (1903) 1 K. B. 118.

Plaintiffs appealed.

Sir E. Clarke, K. C., B. Francis-Williams, K. C., Montague Lush, K. C., and Trevor Lewis, for plaintiffs

Rufus Isaacs, K. C., Holman Gregory, and Clement Edwards, for defendants.

Cur. adv. vult.

[The opinion of VAUGHAN WILLIAMS, L. J., in favor of affirmation, is omitted.]

ROMER, L. J. The law applicable to this case is, I think, well settled. I need only refer to two passages in which that law is shortly and comprehensively stated. In *Quinn v. Leatham*, (1901) A. C. 495, at p. 510, Lord Macnaghten said: "A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." And in *Mogul Steamship Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598, at p. 614, Bowen, L. J., included in what is forbidden "the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." But although, in my judgment, there is no doubt as to the law, yet I fully recognize that considerable difficulties may arise in applying it to the circumstances of any particular case. When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was "sufficient justification or just cause" for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification," and most attempts to do so would probably be mischievous. I certainly shall not make the attempt. In particular I do not think it necessary or useful to discuss the point as to how far the question of justification can be assimilated to the question of malice in cases of libel and slander. As Collins, M. R., said in *Read v. Friendly Society of Operative Stonemasons*, (1902) 2 K. B. 732, at p. 739: "It is not at all necessary in this case to em-

bark upon the question whether 'without just cause' is a complete equivalent for what was meant in the common law by 'malice.' I am inclined to think that, though in many cases adequate as a description, it is not co-extensive with it, nor do I think that in civil actions any more than in criminal it will be possible to eliminate motives from the discussion." I respectfully agree with what Bowen, L. J., said in the *Mogul Case*, when considering the difficulty that might arise whether there was sufficient justification or not: "The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell." I will only add that, in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach. But, though I deprecate the attempt to define justification, I think it right to express my opinion on certain points in connection with breaches of contract procured where the contract is one of master and servant. In my opinion, a defendant sued for knowingly procuring such a breach is not justified of necessity merely by his showing that he had no personal animus against the employer, or that it was to the advantage or interest of both the defendant and the workman that the contract should be broken. I take the following simple case to illustrate my view. If A. wants to get a specially good workman, who is under contract with B., as A. knows, and A. gets the workman to break his contract to B.'s injury by giving him higher wages, it would not, in my opinion, afford A. a defence to an action against him by B. that he could establish he had no personal animus against B., and that it was both to the interest of himself and of the workman that the contract with B. should be broken. I think that the principle involved in this simple case, taken by me by way of illustration, really governs the present case. For it is to be remembered that what A. has to justify is his action, not as between him and the workman, but as regards the employer B. And, if I proceed to apply the law I have stated to the circumstances of the present case, what do I find? On the findings of fact it is to my mind clear that the defendants, the federation, procured the men to break their contracts with the plaintiffs — so that I need not consider how the question would have stood if what the federation had done had been merely to advise the men, or if the men, after taking advice, had arranged between themselves to break their contracts, and the federation had merely notified the men's intentions to the plaintiffs. The federation did more than advise. They acted, and by their agents actually procured the men to leave their work and break their contracts. In short, it was the federation who caused the injury to the plaintiffs. This was practically admitted before us by the coun-

sel for the federation, and, indeed, such an admission could not, in my opinion, be avoided, having regard to the facts stated by the learned judge in his judgment. And it is not disputed that the federation acted as they did knowingly. So that the only question which remains is one of justification. Now the justification urged is that it was thought, and I will assume for this purpose rightly thought, to be in the interest of the men that they should leave their work in order to keep up the price of coal, on which the amount of wages of the men depended. As to this, I can only say that to my mind the ground alleged affords no justification for the conduct of the federation towards the employers; for, as I have already pointed out, the absence on the part of the federation of any malicious intention to injure the employers in itself affords no sufficient justification. But it was said that the federation had a duty towards the men which justified them in doing what they did. For myself I cannot see that they had any duty which in any way compelled them to act, or justified them in acting, as they did towards the plaintiffs. And the fact that the men and the federation, as being interested in or acting for the benefit of the men, were both interested in keeping up prices, and so in breaking the contracts, affords in itself no sufficient justification for the action of the federation as against the plaintiffs, as I have already pointed out. I think, therefore, that the appeal must succeed.

STIRLING, L. J.

That interference with contractual relations known to the law may in some cases be justified is not, in my opinion, open to doubt. For example, I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognized by the courts; for the Court of Chancery and the Chancery Division of the High Court of Justice have continually so interfered on behalf of wards of Court, sometimes with a heavy hand; and the principle on which the judges of those courts have acted is simply that of doing on behalf of the ward that which a right-minded father would do in the true interest of his child. I conceive that circumstances might occur which would give rise to the same duty in the case of a contract of service. I need not say that the present is a very different case from that which I have just put. It would no doubt be desirable if a general rule could be formulated which would determine in what cases such a justification exists; but no such rule has been laid down, and I doubt whether this can be done; so far as I can see it must be left (in the language of Lord Bowen) to the tribunal to analyze the circumstances of each particular case and discover whether a justification exists or not.

In the present case the learned judge finds that the federation and the other defendants "had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop-days, it was their duty and right to give them advice, and to do what might be necessary to secure that the advice should be followed"; and the existence of this duty has been strongly pressed upon us in argument by the learned counsel for the several defendants. It will be observed that the learned judge expressly finds that the defendants were not merely advisers, but also agents "to do what might be necessary to secure that the advice should be followed." In the view which I take of the facts the defendants not only gave advice, but acted, and their action took the form of interfering with the contractual relations between the masters and the men. If in so doing they committed a tort, it would be no answer to say that they acted upon the advice of a third person, as, for example, their own solicitor; and it is difficult to see how they can be in a better position simply because the advice on which they acted emanated from themselves.

In my judgment the liability of the defendants must turn on the answer to be given to the question whether the circumstances of the case were in fact such as to justify the defendants, or any of them, in acting as they did.

The circumstances were these: Middlemen at Cardiff were attempting to reduce the price of coal, and it was feared that some employers might yield to the pressure of competition and enter into agreements for the sale of coal at prices lower than those existing at the time, with the result that the wages of the miners, which were regulated by a sliding scale, would be reduced.

To counteract this it was considered desirable by the men's advisers that prices should be sustained by diminishing the output of coal, and that this should be effected by the men taking the holidays complained of. It was not contended or suggested that a limitation of the output of coal was an illegitimate object or aim on the part of the men, or that, if it could have been attained without the breach of contracts (as, for example, by the service of proper notices putting an end to those contracts), the men would not have been within their legal rights. The difficulty which presented itself was this, — that one of the terms of the arrangement under which the sliding scale of wages existed was that notices of the determination of contracts of employment should only be given on the first day of a calendar month to terminate on the last day, and this prevented notices of termination being effective at the desired moment. The critical period was known to occur in October or November. The men persuaded themselves that it was the masters' interest as well as their own that they should have power to take holidays at this period; but this was a point on which the masters were entitled to have their own opinion; and from what occurred in November, 1900, it was known to the men

that the masters' view did not agree with that of the men. If the men had faith in the soundness of their opinion, their course was to negotiate through the defendants for a modification of the sliding scale arrangement; what they actually thought fit to do was that while insisting on the benefit of the sliding scale they treated themselves as emancipated from the observance of one of the terms on which that scale had been agreed to, although the masters objected, and although the course taken by the men might result in serious damage to the masters, or some of them. This is, I think, a difficult position to maintain. The justification set up seems to me to amount to no more than this — that the course which they took, although it might be to the detriment of the masters, was for the pecuniary interest of the men; and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said, interfered to bring about the violation of legal rights. In my judgment they fail to justify those acts, and the appeal ought to be allowed.

THE COURT declined to grant an immediate injunction, but reserved liberty to the plaintiffs to apply for an injunction in case it should be necessary to do so.

Appeal allowed.

The defendants appealed to the House of Lords. The decision there is reported in Law Reports (1905) Appeal Cases, 239, under the name of South Wales Miners' Federation, et als., Appellants v. Glamorgan Coal Co., Limited, et als., Respondents.

After arguments which occupied six days, the House took time for consideration.

THE EARL OF HALSBURY, L. C., gave an opinion in favor of dismissing the appeal.

LORD MACNAGHTEN.

But what is the alleged justification in the present case? It was said that the council — the executive of the federation — had a duty cast upon them to protect the interests of the members of the union, and that they could not be made legally responsible for the consequences of their action if they acted honestly in good faith and without any sinister or indirect motive. The case was argued with equal candor and ability. But it seems to me that the argument may be disposed of by two simple questions. How was the duty created? What in fact was the alleged duty? The alleged duty was created by the members of the union themselves, who elected or appointed the officials of the union to guide and direct their action; and then it was contended that the body to whom the members of the union have thus committed their individual freedom of action are not responsible for what they do if they act according to their honest judgment in

furtherance of what they consider to be the interest of their constituents. It seems to me that if that plea were admitted there would be an end of all responsibility. It would be idle to sue the workmen, the individual wrong-doers, even if it were practicable to do so. Their counsellors and protectors, the real authors of the mischief, would be safe from legal proceedings. The only other question is, What is the alleged duty set up by the federation? I do not think it can be better described than it was by Mr. Lush. It comes to this — it is the duty on all proper occasions, of which the federation or their officials are to be the sole judges, to counsel and procure a breach of duty.

I agree with Romer and Stirling, L. JJ., and I think the appeal must be dismissed.

LORD JAMES.

In order, therefore, to establish the existence of good cause and excuse, all the defendants can say is, "We, the federation, had the duty cast upon us to advise the workmen. We did advise them to commit an unlawful act, but in giving that advice we honestly believed that they would be in a better financial position than if they acted lawfully and fulfilled their contracts." Even if it be assumed that such allegations are correct in fact, I think that no justification in law is established by them. The intention of the defendants was directly to procure the breach of contracts. The fact that their motives were good in the interests of those they moved to action does not form any answer to those who have suffered from the unlawful act. During the arguments that have been addressed to your Lordships I do not think quite sufficient distinction was drawn between the intention and the motives of the defendants. Their intention clearly was that the workmen should break their contracts. The defendants' motives, no doubt, were that by so doing wages should be raised. But if in carrying out the intention the defendants purposely procured an unlawful act to be committed, the wrong that is thereby inflicted cannot be obliterated by the existence of a motive to secure a money benefit to the wrong-doers.

For these reasons I think the judgment of the Court of Appeal should be affirmed.¹

LORD LINDLEY. My Lords, I agree so entirely with the judgments of Romer and Stirling, L. JJ., that I should say no more were it not for the great importance of some of the arguments addressed to your Lordships on this appeal and which deserve notice.

It is useless to try and conceal the fact that an organized body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover, laws adapted to individuals not acting in concert with others

¹ [As to the distinction between intent and motive, see 20 Harv. Law Review, 256-259. — Ed.]

require modification and extension if they are to be applied with effect to large bodies of persons acting in concert. The English law of conspiracy is based upon and is justified by this undeniable truth.

But the possession of great power, whether by one person or by many, is quite as consistent with its lawful as with its unlawful employment; and there is no legal presumption that it will be or has been unlawfully exercised in any particular case. Some illegal act must be proved to be threatened and intended, or to have been committed, before any court of justice in the United Kingdom can properly make such conduct the basis of any decision.

These remarks are as applicable to trade unions as to other less powerful organizations. Their power to intimidate and coerce is undoubted; its exercise is comparatively easy and probable; but it would be wrong on this account to treat their conduct as illegal in any particular case without proof of further facts which make it so. It is not incumbent on a trade union to rebut any presumption of illegality based only on their power to do wrong. Freedom necessarily involves such a power; but the mere fact of its existence does not justify any legal presumption that it will be abused.

In the case before your Lordships there is proof that the members of the mining federation combined to break and did break their contracts with their employers by stopping work without proper notice and without proper leave. There is also proof that the officials of the federation assisted the men to do this by ordering them to stop work on particular days named by the officials. To break a contract is an unlawful act, or, in the language of Lord Watson in *Allen v. Flood*,¹ "a breach of contract is in itself a legal wrong." The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect. Non-lawyers are apt to think that everything is lawful which is not criminally punishable; but this is an entire misconception. A breach of contract would not be actionable if nothing legally wrong was involved in the breach.

The federation by its officials are clearly proved in this case to have been engaged in intentionally assisting in the concerted breach of a number of contracts entered into by workmen belonging to the federation. This is clearly unlawful, according to *Lumley v. Gye*² and *Quinn v. Leatham*,³ and the more recent case of *Read v. Friendly Society of Stonemasons*.⁴ Nor is this conclusion opposed to *Allen v. Flood*⁵ or the *Mogul Steamship Company's Case*,⁶ where there was no unlawful act committed.

¹ [1898] A. C. at p. 26.
² 2 E. & B. 216.

³ [1901] A. C. 495.
⁴ [1902] 2 K. B. 722.

⁵ [1898] A. C. 1.
⁶ [1892] A. C. 25.

The appellants' counsel did not deny that, in his view of the case, the defendants' conduct required justification, and it was contended (1) that all which the officials did was to advise the men, and (2) that the officials owed a duty to the men to advise and assist them as they did.

As regards advice, it is not necessary to consider when, if ever, mere advice to do an unlawful act is actionable when the advice is not libelous or slanderous. Nor is it necessary to consider those cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavoring to procure a breach of such contract. Nor is it necessary to consider what a parent or guardian may do to protect his child or ward. That there are cases in which it is not actionable to exhort a person to break a contract may be admitted; and it is very difficult to draw a sharp line separating all such cases from all others. But the so-called advice here was much more than counsel; it was accompanied by orders to stop, which could not be disobeyed with impunity. A refusal to stop work as ordered would have been regarded as disloyal to the federation. This is plain from the speeches given in evidence on the trial; and in my opinion it is a very important element in the case which cannot be ignored.

As regards duty the question immediately arises — duty to do what? The defendants have to justify a particular line of conduct, which was wrongful, i. e., aiding and abetting the men in doing what both the men and the officials knew was legally wrong. The constitution of the union may have rendered it the duty of the officials to advise the men what could be legally done to protect their own interests; but a legal duty to do what is illegal and known so to be is a contradiction in terms. A similar argument was urged without success in the case of the Friendly Society of Stonemasons¹ already referred to.

Then your Lordships were invited to say that there was a moral or social duty on the part of the officials to do what they did, and that, as they acted *bonâ fide* in the interest of the men and without any ill-will to the employers, their conduct was justifiable; and your Lordships were asked to treat this case as if it were like a case of libel or slander on a privileged occasion. My Lords, this contention was not based on authority, and its only merits are its novelty and ingenuity. The analogy is, in my opinion, misleading, and to give effect to this contention would be to legislate and introduce an entirely new law, and not to expound the law as it is at present. It would be to render many acts lawful which, as the law stands, are clearly unlawful.

My Lords, I have purposely abstained from using the word "malice." Bearing in mind that malice may or may not be used to denote ill-will, and that in legal language presumptive or implied malice is distinguishable from express malice, it conduces to clearness in discussing such cases as these to drop the word "malice" altogether, and to substitute for it the meaning which is really intended to be conveyed by it. Its

¹ [1902] 2 K. B. 732.

use may be necessary in drawing indictments; but when all that is meant by malice is an intention to commit an unlawful act without reference to spite or ill-feeling, it is better to drop the word malice and so avoid all misunderstanding.

The appeal ought to be dismissed with costs.

*Order of the Court of Appeal affirmed and
appeal dismissed with costs.¹*

¹ [Section 3 of the Trade Disputes Act, 6 Edward 7, Chap. 47, enacted Dec. 21, 1906, is as follows:—

“Sect. 3. An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.” — ED.]

SECTION I. (*continued*).

(c) THE DUTY OF AN INDIVIDUAL NOT TO COMMIT A TORT

NEWMAN v. ZACHARY.

IN THE KING'S BENCH, MICHAELMAS TERM, 1671.

[*Reported in Aley, 3.*]

ACTION sur le case. The plaintiff declares that the defendant was his shepherd, and that two of his sheep did estray, one of which being found again, the defendant affirmed to be the plaintiff's, whereupon the plaintiff paid for the feeding of it, and caused it to be shorn and marked with his own mark; and yet afterwards the defendant *malitiose machinans* to disgrace the plaintiff, and knowing the said sheep to be the plaintiff's, *falso & fraudulententer affirmavit* to the bailiff of the manor that had waifs and strays belonging to it, that this sheep was an estray: whereupon the bailiff seized it to his damage, &c. And after a verdict for the plaintiff *Latch* moved that there was no cause of action, for there is no breach of trust in the defendant as shepherd, and his words cannot endamage the plaintiff, for he shall have his remedy against the bailiff of the manor that seized the sheep wrongfully. But it was adjudged that the action would lie, because the defendant by his false practice hath created a trouble, disgrace, and damage to the plaintiff; and though the plaintiff have cause of action against the bailiff, yet this will not take off his action against the defendant in respect of the trouble and charge that he must undergo in the recovery against the bailiff, and HALE said that if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him that caused the disturbance.

SARAH M. RICE v. JOHN T. COOLIDGE AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, DECEMBER 1, 1876.

[*Reported in 121 Massachusetts Reports, 393.*]

MORTON, J. This is an action of tort. The principal question raised by the demurrer is, whether the plaintiff's declaration states any legal cause of action. Each count alleges, in substance, that a proceeding for a divorce was pending in the courts of the State of Iowa, between Joseph S. Coolidge and Mary L. Coolidge, in which the latter alleged that the said Joseph S. Coolidge had been guilty of adultery with the plaintiff; that the defendants conspired together and with the said Mary L. Coolidge to procure and suborn witnesses to falsely tes-

tify in support of said charges of adultery ; and that the defendants, in pursuance and execution of said conspiracy, did procure and suborn certain witnesses named, to testify in said divorce suit, and to falsely swear to criminal sexual intercourse between the plaintiff and said Joseph S. Coolidge, and between the plaintiff and other persons, and to various other acts and things which, if believed, would tend to bring disgrace and infamy upon the plaintiff.

Three of the counts also allege that the defendants, in pursuance and execution of the conspiracy, published or caused to be published a printed pamphlet in which the false testimony of such witnesses was repeated, and made the pretext for false and malicious charges upon the plaintiff's character and good name.

The gist of the plaintiff's case is that the defendants have suborned witnesses to falsely swear to defamatory statements concerning her, and have done other connected acts in pursuance of a scheme or plan to defame her. The alleged conspiracy or combination is not one of the elements of the cause of action. That is not created by the conspiracy, but by the wrongful acts done by the defendants to the injury of the plaintiff. If the acts charged, when done by one alone, are not actionable, they are not made actionable by being done by several in pursuance of a conspiracy. *Wellington v. Small*,¹ *Parker v. Huntington*,² *Bowen v. Matheson*.³

The question is presented, therefore, whether the plaintiff can maintain an action of tort, in the nature of the common-law action on the case, against the defendants for suborning witnesses to falsely swear to defamatory statements concerning the plaintiff in a suit in which neither of the parties to this suit was a party.

It requires no argument to show that the acts charged as done by the defendants, if proved, are a great wrong upon the plaintiff. It is a general rule of the common law that a man shall have a remedy for every injury. The plaintiff should have a remedy for the injury done to her by the defendants, unless there are some other rules of law, or some controlling considerations of public policy, which take the case out of this rule.

The defendants contend that the witnesses who uttered the defamatory statements are protected from an action, because they were statements made in the course of judicial proceedings, and that therefore a person, who procured and suborned them to make the statements, is not liable to an action.

It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. *Henderson v. Broomhead*,⁴ *Revis v. Smith*,⁵ *Dawkins v.*

¹ 3 Cush. 145.

² 2 Gray, 124.

³ 14 Allen, 499.

⁴ 4 H. & N. 569.

⁵ 18 C. B. 126.

Rokeby,¹ *Seaman v. Netherclift*. The same doctrine is generally held in the American courts, with the qualification, as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. *White v. Carroll*, *Smith v. Howard*,² *Barnes v. McCrate*,³ *Kidder v. Parkhurst*,⁴ *Hoar v. Wood*.⁵ In the last-cited case, Chief Justice Shaw says: "We take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry."

We assume, therefore, for the purposes of this case, that the plaintiff cannot maintain an action against the witnesses in the suit in Iowa, for their defamatory statements, though they were false. But it does not follow that she may not maintain an action against those who, with malice and intent to injure her, procured and suborned those witnesses to testify falsely.

The reasons why the testimony of witnesses is privileged are that it is given upon compulsion and not voluntarily, and that, in order to promote the most thorough investigation in courts of justice, public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony.⁶ But these reasons do not apply to a stranger to the suit, who procures and suborns false witnesses, and the rule should not be extended beyond those cases which are within its reasons.

The argument, that an accessory cannot be held civilly liable for an act for which no remedy can be had against the principal, is not satisfactory to our minds. The perjured witness and the one who suborns him are joint tort-feasors, acting in conspiracy or combination to injure the party defamed. The fact that one of them is protected from a civil suit by a personal privilege does not exempt the other joint tort-feasor from such suit. A similar argument was disregarded by the court in *Emery v. Hapgood*,⁷ where it was held that the defendant, who instigated and procured an officer to arrest the plaintiff upon a void warrant, was liable to an action of tort therefor, although the officer who served the warrant was protected from an action, for reasons of public policy.

¹ L. R. 8 Q. B. 255, and cases cited; affirmed, L. R. 7 H. L. 744.

² 28 Iowa, 51.

³ 32 Maine, 442.

⁴ 3 Allen, 393.

⁵ 3 Met. 193.

⁶ It is well settled that no action is allowed against a witness for damage caused by his perjury. *Davenport v. Sympeon*, Cro. El. 520, Ow. 158, 2 And. 47, s. c.; *Eyres v. Sedgwick*, Cro. Jac. 601, Yelv. 142, 2 Roll. R. 197, s. c.; *Wimberly v. Thompson*, Noy, 6; *Harding v. Bodman*, Hutt. 11; *Coxe v. Smith*, 1 Lev. 119; *Taylor v. Bidwell*, 65 Cal. 489; *Bostwick v. Lewis*, 2 Day, 447; *Grove v. Brandenburg*, 7 Blackf. 239; *Dunlap v. Glidden*, 31 Me. 435; *Severance v. Judkins*, 73 Me. 376, 379; *Garing v. Frasier*, 76 Me. 37; *Phelps v. Stearns*, 4 Gray, 105; *Curtis v. Fairbanks*, 16 N. H. 542; *Smith v. Lewis*, 3 Johns. 157; *Jones v. McCaddin*, 34 Hun, 632; *Cunningham v. Brown*, 18 Vt. 123.

See *Bell v. Senneff*, 83 Ill. 122. — Ed.

⁷ 7 Gray, 55.

The defendants rely upon the cases of *Bostwick v. Lewis*¹ and *Smith v. Lewis*.² But those cases turn upon a principle which does not apply in the case at bar. The facts in those cases were as follows: Lewis brought an action in Connecticut against several defendants, in which he prevailed. Afterwards Bostwick, one of the defendants in the original action, brought an action in Connecticut against Lewis, for suborning a witness in that action; and Smith, another of the defendants, brought a similar action in New York. It was held in each case that the action could not be maintained, because, in the language of Mr. Justice Kent, it was "an attempt to overhaul the merits" of a former suit. The case of *Dunlap v. Glidden*³ is to the same effect. Although the parties to a former action cannot retry its merits, while a judgment therein is in force and unreversed, yet any person who was not a party to the action, or in privity with a party, may in a collateral action impeach the judgment and overhaul the merits of the former action. Those cases, therefore, are not decisive of the case at bar.⁴

The defendants argue that an action of this nature ought not to be maintained, because the plaintiff therein might, by the testimony of a single witness, prove that a witness in another action had committed perjury. The rule of law, that a man cannot be convicted of perjury upon the unaided testimony of one witness, is a rule applicable only to criminal proceedings. The argument may go to show that the rule ought to be extended to civil cases in which perjury is charged against a witness, but it does not furnish a satisfactory reason why a plaintiff should be altogether deprived of a remedy for an injury inflicted upon him.

It is also urged, as an argument against the maintenance of this action, that it is a novelty. The fact that an action is without a precedent would call upon the court to consider with care the question whether it is justified by correct principles of law; but if this is found, it is without weight. In answer to the same argument, Lord Chief Justice Willles said: "A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*.

Upon a careful consideration of the case, we are of opinion that there are no rules of law and no reasons of public policy which deprive the plaintiff of her remedy for the wrong done her by the defendants by suborning witnesses to defame her character.⁵

Demurrer overruled.

¹ 2 Day, 447.

² 3 Johns. 157.

³ 31 Maine, 435.

⁴ See also *Taylor v. Bidwell*, 65 Cal. 489; *Curtis v. Fairbanks*, 16 N. H. 542; *Stevens v. Rowe*, 59 N. H. 578. — Ed.

⁵ A part of the opinion relating to points of pleading is omitted. — Ed.

SMITH v. TONSTALL.

IN THE KING'S BENCH, TRINITY TERM, 1606.

[Reported in *Carthew*, 3.]

IN a special action on the case, the plaintiff declared as administrator *durante minore ætate* of R. S., executor of the last will and testament of R. S., his father, setting forth that the testator, R. S., in his life-time had obtained a judgment for £100 against W. S., who was likewise indebted to the testator in another £100 for rent; and that after the death of the said testator, the plaintiff had judgment on a *scire facias* to have execution, &c., and that he intending to take out execution, and also to bring an action of debt for the rent in arrear (the said W. S. being then possessed of goods and chattels sufficient to discharge the whole), which being very well known to the defendant, he of his malice and covin with the said W. S. did conspire to defeat the plaintiff of his execution, and of recovering the money for rent arrear, procured the said W. S. to confess a judgment for £160 (of such a Term) to one W. N., *ubi revera*; the said W. S. did not owe anything to the said W. N., and that he sued out execution upon this *feigned judgment*, by virtue whereof he seised all the goods and chattels of the said W. S., which he esloined to places unknown, and converted to his own use, by reason whereof the plaintiff lost his debt.

The defendant demurred to this declaration for matter in law, supposing that this action would not lie; but it was adjudged that the action would lie, and thereupon the defendant Tonstall brought a writ of error in parliament, where the judgment was affirmed.¹

E. J. KLOUS v. E. HENNESSEY AND OTHERS.

IN THE SUPREME COURT, RHODE ISLAND, JUNE 14, 1881.

[Reported in 13 *Rhode Island Reports*, 332.]

DURFEE, C. J.² This is an action on the case for conspiracy. The declaration charges in effect that the defendants and one Patrick Kenney, said Kenney being then a debtor of the plaintiffs, conspired together to prevent the plaintiffs and the other creditors of said Kenney from getting payment of their claims out of his property, and that, in pursuance of the conspiracy, Kenney made fictitious mortgages of his real and personal property to the defendants, under cover of which the defendants removed the personal property out of the possession of

¹ Findlay v. McAllister, 113 U. S. 104 (*semble*); Adams v. Page, 7 Pick. 541 *Accord.* — Ed.

² Only the opinion of the court is given. — Ed.

Kenney, and secreted it so that the plaintiffs were prevented from attaching it, and thus lost their claims. At the trial, after the plaintiffs had introduced their testimony in proof of the declaration, the court, on motion of the defendants, it having appeared that the plaintiffs were merely creditors at large of Kenney, without any interest in his property or lien upon it by attachment, levy, or otherwise, ruled that the action, in respect of the charges aforesaid, was not maintainable. The plaintiffs excepted to the ruling for error, and now petition for a new trial.

There is some conflict of authority on the question thus raised, but the more numerous and, we think, the better-reasoned and stronger cases are against the action. The principal ground of decision in these cases is that the damage, which is the gist of the action, is too remote, uncertain, and contingent, inasmuch as the creditor has, not an assured right, but simply a *chance* of securing his claim by attachment or levy, which he may or may not succeed in improving. It is impossible to find any measure of damages for the loss of such a mere chance or possibility. Another ground, added in some of the cases, is that no action would lie in favor of such a creditor against the debtor for putting his property beyond the reach of legal process, if the debtor were to do it by himself alone, and that what would not be actionable if done by himself alone cannot be actionable any the more when done by him with the assistance of others. The first of these grounds, which is the fundamental one and has been chiefly relied on, has been so exhaustively analyzed and discussed in the cases that it is impossible for us to add anything to the reasons adduced in support of it; and therefore, without reproducing them, we deem it sufficient simply to cite the cases themselves, all of which are accessible and can be readily consulted. *Lamb v. Stone*; ¹ *Wellington v. Small*; ² *Moody v. Burton*; ³ *Adler v. Fenton*; ⁴ *Austin v. Barrows*; ⁵ *Kimball v. Harman & Burch*; ⁶ *Bradley v. Fuller*.⁷ See also *Bump on Fraudulent Conveyances*, 505, 506; *Cooley on Torts*, 124, 586. *Petition dismissed*.⁸

¹ 11 Pick. 527.

² 3 Cush. 145.

³ 27 Me. 427, 431.

⁴ 24 How. U. S. 407.

⁵ 41 Conn. 287, 296.

⁶ 34 Md. 407, 410.

⁷ 118 Mass. 239.

⁸ *Adler v. Fenton*, 24 How. 407; *Findlay v. McAllister*, 113 U. S. 104 (*semble*); *Austin v. Barrows*, 41 Conn. 287; *Green v. Kimble*, 6 Blackf. 552; *Moody v. Burton*, 27 Me. 427; *Lamb v. Stone*, 11 Pick. 527; *Wellington v. Small*, 3 Cush. 146; *LeGierse v. Kellum*, 66 Tex. 242 *Accord*.

Penrod v. Mitchell, 8 S. & R.; *Penrod v. Morrison*, 2 Pa. 126; *Mott v. Danforth*, 6 Watts, 305; *Hopkins v. Beebe*, 26 Pa. 85, 87; *Kelsey v. Murphy*, 26 Pa. 78, 84; *Collins v. Cronin*, 117 Pa. 35, 45 *Contra*. — Ed.

H. WHITMAN, TRUSTEE, v. G. L. SPENCER AND J. WILBOUR.

IN THE SUPREME COURT, RHODE ISLAND, MARCH, 1852.

[Reported in 2 Rhode Island Reports, 124.]

GREENE, C. J.,¹ charged the jury. The plaintiff charges the defendants with conspiring for the purpose of depriving him of his remedy on the property of Wilbour for the recovery of his debt. The declaration sets forth that Wilbour, being indebted to the plaintiff in the sum of \$6,000, executed to Spencer an absolute bill of sale of his stock of goods, with the understanding that the goods were to be removed from New York, where they were liable to attachment, into Rhode Island, and that the plaintiff was thereby defrauded of his remedy against them. It is generally true in law that for every injury there is a remedy, but the party must prove his injury in order to entitle him to the remedy. The charge is a charge of fraud, and must be clearly made out. In this case it is not denied that Wilbour owed the plaintiff the sum of \$6,000, that the debt was incurred on goods sold to stock the defendant, Wilbour's, store in New York; nor is it denied that on the 29th of December, 1851, Wilbour had on hand a stock worth about \$6,000, and that at that time he made to Spencer a clear bill of sale of the same without any consideration; and that the goods were brought to Providence and there stored and afterwards sold by Spencer. Spencer's account of this transaction is that the goods were brought to Providence to be sold for the benefit of Wilbour's creditors, under such preferences as he chose to make; he attempting to do in this informal way what ought to have been done in a more regular way by an assignment, and that there was no intent to convert them to the use of the defendants or to defraud the creditors of Wilbour. Now you will look into all the circumstances, whether admitted or disputed, and if upon a fair consideration you shall think the goods were honestly taken with a *bona fide* intent to pay the debts of the creditors, and not to defraud the plaintiff or to compel him to a compromise, then you need go no further, for though the bill of sale constituted no legal transfer of the property as to creditors, but still left it open to attachment, yet if their motive was honest the defendants cannot be liable upon a charge of fraudulent conspiracy. But if their motive was to secrete the property or to compel Handy to a compromise upon their own terms without making an exhibit of the affairs of Wilbour, then they are legally guilty of a conspiracy. The question turns entirely upon their motive in the transaction, and lies wholly within the province of the jury.

If the defendants were actuated by a dishonest motive, it will then remain for you to award the plaintiff damages. Whatever damages he

¹ Only the opinion of the court is given. — Ed.

has sustained you will award to him ; if he was the sole creditor he is entitled to full payment, if the proceeds of the sale of the goods were sufficient for that purpose ; if there were other creditors, with equal or greater claims on the property, this will be a matter for you to consider in determining the damages to be given.

The jury were unable to agree.¹

MOTT v. DANFORTH.

1837. 6 Watts, Pa., 304.²

ERROR to the common pleas of Susquehanna County.

Case by Danforth against Ithamar Mott and Sylvania Mott, for conspiracy and fraud.

The declaration contained three counts. In substance plaintiff alleged : that Tarbox was indebted to plaintiff in the sum of 998 dollars and interest, on a note dated May 8, 1833, payable in six months ; that Tarbox was possessed of goods and chattels sufficient to pay the same ; that defendants contriving, and fraudulently intending to deceive and defraud plaintiff, by conspiracy with Tarbox, to defeat and prevent plaintiff from recovering his debt, secreted and eloiigned to places unknown to plaintiff, the said goods and chattels of Tarbox, and aided and assisted, advised and procured Tarbox to leave the country and go to places unknown without paying said debt, by reason whereof the debt was totally lost.

On the trial evidence was given that Tarbox had been a travelling pedlar in Pennsylvania, in possession of valuable goods and chattels ; that in May, 1833, Tarbox purchased of plaintiff in Connecticut near \$1000 worth of articles, at a credit of six months, and gave his note therefor ; that Tarbox also purchased of two other persons in Connecticut to a considerable amount ; that defendants were well acquainted with the state of Tarbox's affairs and his indebtedness in Connecticut ; that defendants colluded with Tarbox in various ways to enable him to defraud his Connecticut creditors ; and that for this purpose, in October, 1833, about eight days before the note to plaintiff became due, defendants obtained from Tarbox his goods and chattels, as well as notes and securities for debts due to him, by a sale or pretended sale, and assisted and accompanied him in absconding from the state leaving his debts unpaid, and taking with them, and otherwise disposing of, his property and effects.

The charge of the court was as follows :—

¹ Page v. Parker, 43 N. H. 363 ; Moore v. Tracy, 7 Wend. 229 ; Place v. Minster, 65 N. Y. 89 Accord. — Ed.

² [Statement abridged. Arguments and part of opinion omitted. — Ed.]

Herriek, president. "If the jury think, from all the evidence in the cause, that Ithamar and Sylvanus W. Mott, conspired with Tarbox to defraud his creditors, and that in pursuance of such agreement, the defendants took assignments of his property, and aided and assisted him in getting out of the state, with his property, moving to places unknown, by which means the plaintiff was defrauded and prevented from the recovery of his debt, this action can be maintained. And the court think if the plaintiff's note was not payable for eight days, it would make no difference, if by the means of the conspiracy and fraud, the plaintiff is defrauded and prevented from the recovery of his debt. Nor would it be material that the defendants did not know that the plaintiff was a creditor, provided the conspiracy was to defraud all Tarbox's creditors in Connecticut, and the plaintiff was one of them. If the jury should be of opinion that the plaintiff ought to recover, they may find the amount of the plaintiff's claim if they think proper, provided the goods, notes and money assigned, and taken off by Mott and Tarbox by conspiracy and fraud, amount to such claim, but they can find for no greater sum than the amount so assigned and carried off as aforesaid. The jury found a verdict for the plaintiff for 796 dollars 52 cents.

Jessup and Conyngnam, for plaintiff in error.

Dimmock and Greenough, contra.

[Arguments and citations omitted.]

SERGEANT, J. The action on the case for a conspiracy has in modern times taken the place of the writ of conspiracy, which seems to be considered as antiquated. The instances of these suits in our reports are not very numerous, but sufficient appears to show that an action on the case lies wherever the plaintiff is aggrieved and damnified by unlawful acts, done by the defendants, in pursuance of a combination and conspiracy for that purpose.

In *Mitchell v. Morrison and Penrod*, 8 Serg. & Rawle, 522, and 2 Penn. Rep. 126, the plaintiff, Mitchell, had obtained judgment against Morrison, and the defendant Penrod had, previously to the judgment, obtained from Morrison his effects, consisting of certificates of turnpike stock, and then had Morrison imprisoned under an execution, on a judgment before a justice of the peace, until he was discharged under the insolvent laws. It was held that the action on the case for the conspiracy was maintainable; ROGERS, J., says, although Mitchell could not collect his debt by *feri facias* and levy, yet satisfaction might have been obtained, by compelling Morrison to assign for the benefit of his creditors; there was at least a chance of satisfaction, of which he ought not to be deprived by any fraudulent combination with his debtor.

In *Meredith v. Benning*, 1 Hen. & Munf. 535, there is a report of an action brought in the District Court of Prince Edward County, in

which the plaintiff had become surety for P. M., a deputy sheriff, and had been obliged to pay money for him, and he being about to sue and implead, and move against him for indemnification, the defendant, not ignorant of the premises, but craftily, etc., intending to defraud and injure the plaintiff, did secretly and maliciously, take and carry away the slaves, horses, cattle, household goods and chattels, of the said P. M. to parts unknown, and did keep, secrete, and conceal them; and also, did then and there aid, assist, and counsel the said P. M., in removing himself to parts unknown, to the end, that the plaintiff might be prevented from recovering indemnification as aforesaid. The jury gave a verdict for the plaintiff, which the court, on motion for a new trial, confirmed; and the principle of the case seems to be approved by the judges of the Supreme Court of Appeals in a subsequent chancery proceeding between the parties.

It would seem that in most of the cases this remedy has been employed for acts in the nature of malicious prosecution, or abuse of legal proceedings; yet I perceive no reason why it should be confined to such cases. Conspiracy comprehends any confederacy to prejudice a third person, as where divers confederate to impoverish a third person; Hawk, P. C. Bk. 1, c. 72; or to defraud by agreement among themselves, to accept, indorse, and negotiate fictitious bills. 1 Leach, C. L. 232. It seems clear that a combination to commit a misdemeanor, or other act, prohibited by law, constitutes this offence. 6 Petersdorf's Abr. 99. By 13 Eliz. ch. 5 (in force here), all fraudulent gifts, grants, etc., of lands, tenements, etc., goods and chattels, to the purpose and intent, to delay, hinder, and defraud creditors, are declared, as against them, void and of no effect; and by sect. 3, the parties are subjected to a penalty. A conveyance is fraudulent within this statute, even though a valuable consideration passes, if made with intent to hinder and defraud creditors. Cowp. 434. As where a person, knowing there was a decree in chancery and sequestration, bought the defendant's house and goods, and gave a full sum for them, yet being with a manifest intent to defraud the creditor, it was held fraudulent and void. *Ibid.* Nor is it necessary the plaintiff should have proceeded to judgment, or even brought suit, to bring the parties within the scope of the statute. Information on 13 Eliz., plaintiff had brought debt against J. S., and attachment issued, and sheriff being ready to attach defendant by his goods, the defendant in disturbance of the execution of the process, showed a conveyance, by which he claimed them, and averred the fraud. It was objected not to be within the statute, because it goes not in delay of execution, no judgment being, but only in delay of process. The court held the contrary, by reason of the word, delay, for appearance is delayed. And Periam and Rhodes conceived that avowing such conveyance, though no suit is pending, is within the statute; but Anderson doubted. *Pendleton v. Gunston*, Leon. 47.

The circumstance that the debt was not payable at the time of the alleged fraud, is not, in our opinion, a valid objection. Although it was not then payable, yet it was on the eve of becoming so, and the plaintiff might be as much defeated of his debt by acts done just before he was about to proceed to recover it as afterwards. The plaintiff's claim is founded, not so much on his debt being due, as on the injury done to him by the defendant's sweeping away that property belonging to the debtor, which he might have made available by legal proceedings for recovery of his debt; and if this could be done just before the debt became due, the fraud might be committed with impunity. The question is one of fact for the jury, whether the acts were fraudulently done to defeat the plaintiff of his just debt, and whether he thereby lost the same. Nor is it necessary the designs of the defendants should be levelled at the plaintiff alone; if intended against him and others in the same situation, it is rather an aggravation than an alleviation of the offence.

As to the damages, the measure is stated in *Mitchell v. Penrod*, 8 Serg. & Rawle, 524, to be the value of the property withdrawn from the reach of the plaintiff by the assignments, and not the amount of the debt due to the plaintiff, and this appears to be the standard intended by the court below, in the present case, though the phraseology might have been more distinct. It is not easy to judge what was the property assigned by Tarbox to the plaintiffs and withdrawn, or its value; much was transacted secretly between the parties, and it was for the jury to judge how far it consisted of goods, notes, or money. The court, however, confine the plaintiff's claim to so much as was assigned and taken off by the parties, and the amount recovered was considerably below the plaintiff's debt.

*Judgment affirmed.*¹

¹ Authorities bearing upon *Klous v. Hennessey* and *Mott v. Danforth* are collected and classified in a note in 47 L. R. Ann. pp. 433-440. — Ed.

SECTION II.

By Influencing a Third Person who owes No Legal Duty to the Plaintiff.

(a) BY SLANDER OF TITLE AND DISPARAGEMENT OF GOODS.

PENNYMAN v. RABANKS.

IN THE QUEEN'S BENCH, MICHAELMAS TERM, 1596.

[Reported in Croke, Elizabeth, 427.]

ACTION upon the case for slandering his title. For that he said to J. S., who was in speech to buy the plaintiff's land, "I know one that hath two leases of his land, who will not part with them at any reasonable rate," *ubi revera nulla talis dimissio facta fuit*. The defendant justifies by reason of two several leases by parol made unto himself. The plaintiff replies *de injuria sua propria absque tali causa*. Issue was joined, and found for the plaintiff. It was now moved in arrest of judgment that an action lay not for these words; because it appears by the defendant's justification that he intended of leases made of himself; and if a man claim estates, although they be false he shall not be punished. This was agreed by all the court, that no action lay against one for saying that he himself had title or estate in lands, &c., although it were false. But here the words in the declaration, as they are spoken, being in the third person, be not intendable of himself, but of some other, and import a slander to the plaintiff's title; and then his justification afterwards shall not take away that action which before was given to the plaintiff for the slandering of his title. Wherefore rule was given that judgment should be entered for the plaintiff, unless other matter was shown upon the third day of the next term. Afterwards, Pasch. 38 Eliz., it was adjudged for the plaintiff, FENNER *contradicente*.¹

¹ Mildmay's Case, 1 Rep. 177 b; Marvin v. Maynard, Cro. El. 419; Newman v. Zachary, Al. 8; Rowe v. Roach, 1 M. & S. 304; Bignell v. Buzzard, 3 H. & N. 217; Webb v. Cecil, 9 B. Mon. 198; Ross v. Pynes, Wythe, 71, 3 Call, 490 *Accord.* — ED.

In Rowe v. Roach, *supra*, Lord Ellenborough said, p. 310: "The law makes no allowance for the slander of strangers, whatever it may do in behalf of those who have a real title, or a claim of title. *Rei immiscet se alienæ* is the good sense which must govern this case. Here the defendant is a stranger himself, and shows no authority from those who are parties in interest." — ED.

HATCHARD v. MÈGE AND OTHERS.

IN THE QUEEN'S BENCH DIVISION, APRIL 1, 1887.

[Reported in 18 Queen's Bench Division Reports, 771.]

DAY, J.¹ This is an application to set aside a nonsuit, which was directed by the Lord Chief Justice on the opening statement of counsel, and the question is whether the nonsuit was properly entered.

The statement of claim alleged that the defendants wrote and published "of and concerning the plaintiff and his said trade as a wine-merchant and importer the following false and malicious libel, that is to say:—

" ' Caution : Delmonico Champagne. Messrs. Delbeck & Co., finding that wine stated to be Delmonico champagne is being advertised for sale in Great Britain, hereby give notice that such wine cannot be the wine it is represented to be, as no champagne shipped under that name can be genuine unless it has their names on their labels. Messrs. Delbeck & Co. further give notice that if such wine be shipped from France they will take proceedings to stop such shipments, and such other proceedings in England as they may be advised,' thereby meaning that the plaintiff had no right to use his said registered trade-mark or brand for champagne imported or sold by him, and that in using such trade-mark or brand he was acting fraudulently, and endeavoring to pass off an inferior champagne as being of the manufacture of Messrs. Delbeck & Co., and that the champagne imported and sold by the plaintiff was not genuine wine, and that no person other than the defendants had the right to use the word ' Delmonico ' as a trade-mark or brand, or part of a trade-mark or brand, of champagne in the United Kingdom."

The publication there set out is complained of as a libel on the plaintiff in relation to his trade. It is substantially a warning not to buy Delmonico champagne because it is not genuine. The statement of claim alleges that the publication is false and malicious; that would be a question for the jury; it is not for us to consider the facts of the case; we can only look at what was opened by the plaintiff's counsel and what appears on the pleadings. The innuendo charges that the defendants intended to convey the meaning that the plaintiff had no right to use his trade-mark or brand, and that the wine he sold was not genuine. It may be that the publication bears that meaning, and that the words used import dishonesty. The plaintiff has died, and the question to be decided is how much, if any part, of the cause of action survives. The statute 4 Edw. 3, c. 7, and the course of practice, make it clear that a civil action for libel dies with the death of the person libelled. It does not come within the spirit, and certainly not within the letter of the statute. There is, however, a further question whether

¹ Only the opinion of DAY, J., is given. WELLS, J., concurred. — ED.

a right of action can survive because injury to the plaintiff's trade-mark is alleged. Injury to trade is constantly alleged in actions for libel, and therefore that does not affect the question of survivorship. In the present case the second part of the statement of claim may be subdivided into two separate and distinct claims. The first is for ordinary defamation, either independently of the plaintiff's trade, affecting his character by charging him with being a dishonest man, or defamation of him in his trade by charging him with being a dishonest wine-merchant. That claim would not survive, for it is nothing more than a claim in respect of a libel on an individual. But this publication may be construed to mean that the plaintiff had no right to use his trade-mark. This is not properly a libel, but is rather in the nature of slander of title, which is well defined in *Odgers on Libel and Slander*, c. v., p. 137, in the following passage: "But wholly apart from these cases there is a branch of the law (generally known by the inappropriate but convenient name — slander of title) which permits an action to be brought against any one who maliciously decries the plaintiff's goods or some other thing belonging to him, and thereby produces special damage to the plaintiff. This is obviously no part of the law of defamation, for the plaintiff's reputation remains uninjured; it is really an action on the case for maliciously acting in such a way as to inflict loss upon the plaintiff. All the preceding rules dispensing with proof of malice and special damage are therefore wholly inapplicable to cases of this kind. Here, as in all other actions on the case, there must be *et damnum et injuria*. The *injuria* consists in the unlawful words maliciously spoken, and the *damnum* is the consequent money loss to the plaintiff."

It appears, therefore, that the first and last parts of the innuendo in the present case suggest slander of title. As appears from the passage I have read, an action for slander of title is not an action for libel, but is rather in the nature of an action on the case for maliciously injuring a person in respect of his estate by asserting that he has no title to it. The action differs from an action for libel in this, that malice is not implied from the fact of publication, but must be proved, and that the falsehood of the statement complained of, and the existence of special damage, must also be proved in order to entitle the plaintiff to recover. The question whether the publication is false and malicious is for the jury. Here, I think, special damage is alleged by the statement of claim, and if the plaintiff could have shown injury to the sale of the wine which he sold under his trade-mark, he would have been entitled to recover, and that is a cause of action which survives.

For these reasons I am of opinion that the nonsuit was right so far as it related to the claim in respect of a personal libel, but was wrong as to the claim in respect of so much of the publication as impugned the plaintiff's right to sell under his trade-mark or brand.

There will, therefore, be an order for a new trial, but it will be limited to this latter part of the claim. *Order for a new trial.*

MALACHY v. SOPER AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 25, 1836.

[Reported in 3 Bingham, New Cases, 371.]

TINDAL, C. J.¹ In this case a verdict having been found for the plaintiff at the trial of the cause with £5 damages, a motion has been made to arrest the judgment on the ground that the declaration does not state any legal cause of action. And we are of opinion that this objection is well founded; and that the judgment must be arrested.

This is not an ordinary action for defamation of the person, by the publication of slander either oral or written; in which form of action no special damage need either be alleged or proved; the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the "petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as share-owners in a certain mine, for an account and an injunction, had been granted by the Vice-Chancellor, and that persons duly authorized had arrived in the workings." The publication therefore is one which slanders not the person or character of the plaintiff, but his title as one of the shareholders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff, in order to maintain this action, must show a special damage to have happened from the publication, and that this declaration shows none.

The first question therefore is, does the law require in such an action an allegation of special damage? And looking at the authorities we think they all point the same way. The law is clearly laid down in *Sir W. Jones*, 196 (*Lowe v. Harewood*): "of slander of title, the plaintiff shall not maintain action, unless it was *revera* a damage; *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the bar, viz., *Sir John Tasborough v. Day*,² and *Manning v. Avery*,³ the case of *Cane v. Goulding*⁴ furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "his right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiose*, and that he was likely to sell, and was injured by the words; and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment; and Rolle, C. J., said, "there ought to be a scandal and a particular damage set forth, and there is not here:" and upon its being moved again

¹ Only the opinion of the court is given. — Ed.

² Cro. Jac. 484.

³ Keb. 153.

⁴ Style's Rep. 169, 176.

and argued by the judges, Rolle, C. J., held that the action did not lie, although it was alleged that the words were spoken *false et malitiose*, for "the plaintiff ought to have a special cause; but that, the verdict might supply; but the plaintiff ought also to have showed a special damage which he hath not done, and this the verdict cannot supply: the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;" and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title. This action is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day.

The next question is, has there been such a special damage alleged in this case, as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (R. 1 Roll. 244). Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, "that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine, and from working and using the same in so ample and beneficial a manner as he otherwise would have done." And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

It has been argued in support of the present action, that it is not so much an action for slander of title as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plain-

tiff's title to his shares, and nothing else. The bill in Chancery, out of which the publication arose, is filed by Tollervy, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines, was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, that is, whether it be through words, or writing, or print; but that it rests on the nature of the action itself, namely, that it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication appears to us to make no other difference than that it is more widely and permanently disseminated, and the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion, that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the *innuendo* laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment, *Absolute*.¹

¹ *Tasburgh v. Day*, Cro. Jac. 484; *Gresham v. Grinsley*, Yelv. 88; *Sneede v. Badley*, 3 Bulst. 74, 1 Roll. 244, s. c.; *Law v. Harwood*, Cro. Car. 140, *W. Jones*, 196; *Cane v. Golding*, Sty. 169, 176; *Manning v. Avery*, 3 Keb. 153; *Hadden v. Lott*, 15 C. B. 411; *Evans v. Harlow*, 5 Q. B. 624; *Ashford v. Choate*, 20 Up. Can. C. P. 471; *Collins v. Whitehead*, 34 F. R. 121; *Stark v. Chitwood*, 5 Kans. 141; *Continental Co. v. Little* (Ky. 1900), 117 S. W. R. 310; *Swan v. Tappan*, 5 Cush. 104; *Gott v. Pulsifer*, 122 Mass. 235; *Dooling v. Budget Co.*, 144 Mass. 268; *Boynton v. Shaw Co.*, 146 Mass. 219; *Wilson v. Dubois*, 35 Minn. 471; *Tobias v. Harland*, 4 Wend. 537; *Madison Church v. Madison Church*, 26 How. Pr. 73; *Lindeg v. Graham*, 1 Duer, 670; *Bailey v. Dean*, 5 Barb. 297; *Kendall v. Stone*, 5 N. Y. 14; *Kennedy v. Press Co.*, 41 Hun, 422; *Childs v. Tuttle*, 48 Hun, 222; *Maglio v. N. Y. Co.*, 93 N. Y. Ap. Div. 546 *Accord*.

The breach of a contract by a third person is special damage. *Green v. Button*, 2 C. M. & R. 707. But see *contra*, *Kendall v. Stone*, 5 N. Y. 14; *Brentman v. Note*, 3 N. Y. Sup. 420 (N. Y. City Court). — Ed.

PITT v. DONOVAN.

IN THE KING'S BENCH, JUNE 29, 1818.

[Reported in 1 Maule & Selwyn, 639.]

ACTION for slander of title. Plea: general issue.

At the trial before Graham, B., it appeared that the plaintiff had purchased certain lands at Bromesberrow from W. H. Y., and was about to sell the same to one Barton, but that the defendant wrote two letters to Barton warning him against completing the purchase, on the ground that W. H. Y. was insane at the time of his conveyance to the plaintiff. Barton thereupon declined to purchase the lands. It further appeared that a term of years in the estate was vested in the defendant as trustee for securing to Mrs. W. H. Y. her jointure, and that the defendant's wife was sister of W. H. Y., and his heir in the event of his dying without issue.

After an investigation of many hours the learned judge left the question to the jury upon the evidence, stating to them, in the course of his summing up, that in order to maintain the action some malice must be fixed on the defendant, that is, the action must be injurious and proceeding from an improper motive; that if the evidence satisfied them, as men of good sense and good understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict.

The jury found a verdict for the plaintiff, damages 40s.; whereupon a rule nisi was obtained in the last term for a new trial, on the ground of a misdirection.

Dauncey, Abbott, and Puller, now showed cause.¹

The Attorney-General, Jervis, and W. E. Taunton, contra, were stopped by the court.

BAYLEY, J.² I am of the same opinion. It seems to me that the question for the consideration of the jury was, whether the defendant really believed that which he made the subject of his communication. I have no difficulty in saying that the defendant is not to be regarded as a mere stranger in this case. I think that he had not only a right, but, if he believed it to be true, that he was called upon to make the communication; for if at any subsequent time Mr. Y. should die without issue, and afterwards the defendant should bring an ejectment to try the sanity of this gentleman, it would afford matter for strong observation against him, that he had suffered Burton to complete the

¹ The statement of the case has been condensed; the argument for the plaintiff, and the concurring opinions of LORD ELLENBOROUGH, C. J., and DAMPIER, J., are omitted. — Ed.

² LE BLANC, J., had left the court.

purchase of this estate and to pay his money for it, without communicating to him that his title would be disputed. I think, therefore, that if the defendant really believed this contract to be void for the want of sanity in Y., it was not only his right but his duty to make the communication. Then where a person who is not to be treated as a mere stranger is sued in an action of this kind, two things are to be made out; first, that there is a want of probable cause; and secondly, that the party who made the communication acted maliciously. Now whether a party acted maliciously depends upon his own motives and on the view which the jury entertained of the mind of the party himself; and we cannot try what are the motives and feelings of particular men's minds by referring to the mind of some one other person; therefore if we refer to a mind that is sensible and reasonable, and which does not judge under the same pressure as the mind of the person in question might do, and make that sensible and reasonable mind the standard by which to judge of the state of mind of the person who is under that pressure, we shall be referring to an improper rule to judge by. The question here is not what judgment a sensible and reasonable man would have formed in this case, but whether the defendant did or did not entertain the opinion he communicated. I forbear to give any opinion on the weight of evidence, but the short question is, whether the defendant acted *bona fide*. That was the question for the jury to decide, but was not left to them in that form; that is, whether he acted maliciously or not. I therefore feel myself bound to say that there ought to be a new trial.

*Rule absolute.*¹

¹ Gerard v. Dickenson, 4 Rep. 18 a, Cro. El. 196, s. c.; Lovett v. Weller, 1 Rolle R. 409; Anon., Sty. 414; Smith v. Spooner, 3 Taunt. 246; Green v. Button, 2 C. M. & R. 707; Pater v. Baker, 3 C. B. 831; Watson v. Reynolds, M. & M. 1; Carr v. Duckett, 5 H. & N. 783; Atkins v. Perrin, 3 F. & F. 179; Brook v. Rawl, 4 Ex. 521; Burnett v. Tak, 45 L. T. Rep. 743; Steward v. Young, L. R. 5 C. P. 122; Wren v. Weild, L. R. 4 Q. B. 730; Hart v. Wall, 2 C. P. D. 146 (*semble*); Baker v. Piper, 2 T. L. R. 733; Dicks v. Brooks, 15 Ch. D. 22; Halsey v. Brotherhood, 19 Ch. Div. 386; Royal Co. v. Wright, 18 Pat. Cas. Rep. 95; Dunlop Co. v. Talbot, 30 T. L. R. 579; Boulton v. Shields, 3 Up. Can. Q. B. 21; Hill v. Ward, 13 Ala. 310; McDaniel v. Baca, 2 Cal. 326; Thompson v. White, 70 Cal. 135; Reid v. McLendon, 44 Ga. 156; Van Tuyl v. Riner, 3 Ill. App. 556; Stark v. Chitwood, 5 Kans. 141; Gent v. Lynch, 23 Md. 58; Swan v. Tappan, 5 Cush. 104; Weekley v. Bostwick, 49 Mich. 374; Chesebro v. Powers, 78 Mich. 472; Meyrose v. Adams, 12 Mo. Ap. 329; Butts v. Long, 106 Mo. Ap. 313; Andrew v. Deshler, 45 N. J. 167; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 4 Keyes, 397, 3 Abb. Ap. 62, 41 Barb. 186; Hovey v. Rubber Co., 57 N. Y. 119; Dodge v. Colby, 37 Hun, 515, 108 N. Y. 445; Lovell Co. v. Houghton, 116 N. Y. 520; Hastings v. Giles Co., 51 Hun, 364, 131 N. Y. 674; Cornwell v. Parks, 52 Hun, 596, 133 N. Y. 657; McElwee v. Blackwell, 94 N. Ca. 281; Harris v. Sneed, 101 N. Ca. 373 *Accord*. — Ed.

THE WESTERN COUNTIES MANURE CO. v. THE LAWES
CHEMICAL MANURE CO.

IN THE EXCHEQUER, JUNE 9, 1874.

[Reported in Law Reports, 9 Exchequer, 218.]

BRAMWELL, B.¹ In this case our judgment must be for the plaintiffs. The case may be shortly stated thus. The plaintiffs trade in a certain article of manure, and it is alleged that the defendants falsely and maliciously published of and concerning that manure, and of and concerning the plaintiffs' trade and manufacture, a certain statement which contains in it this, — that it was an article of low quality and ought to be the cheapest of four, of which this is one, the others being mentioned. So far an action would not be maintainable, because it is not libelling an article to say that it is an article of low quality and ought to be cheaper than others. That part is not specifically stated to be untrue, but having been published as it is said of and concerning the plaintiffs' manufactures and trade, the declaration goes on and says, "meaning thereby that the artificial manures so manufactured and traded in by the plaintiffs were artificial manures of inferior quality to other artificial manures, and that they especially were of inferior quality to the artificial manures of the defendants." I think if it stopped there it would not be the subject-matter of an action, even with special damage resulting from it, because I do not see that it is injurious to an article to say that it is of inferior quality. It may attract certain customers, and it is a very good thing that people can be found who will sell things of an inferior quality in order that they may not be wasted. But what makes the action maintainable is the allegation that follows: "Whereas, in truth and in fact, the said artificial manures so manufactured and traded in by the plaintiffs were not of inferior quality, and were not inferior in quality to the said articles of manure of the defendants;" and by reason of the premises, certain persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, are alleged to have ceased to deal with them. So that it appears there was a statement published by the defendants of the plaintiffs' manufacture, which is comparatively disparaging of that manufacture, which is untrue so far as it disparages it, and which has been productive of special damage to the plaintiffs; and it is stated that that publication was made falsely and "maliciously," which possibly may mean nothing more than that it was made falsely, and without reasonable cause, calling for a statement by the defendants on the subject. But if actual malice is necessary — which I do not think is the case — the allegation is sufficient. It seems to me, however, that where a plaintiff says, "You have without lawful cause made a false statement about my goods to their

¹ Only the opinions of the court are given. — Ed.

comparative disparagement, which false statement has caused me to lose customers," an action is maintainable.

I do not go through the cases, but undoubtedly there is nothing in any of them inconsistent with the judgment we now pronounce. The only case that I will refer to is *Young v. Macrae*.¹ When examined that case will be found to differ materially from this one. The disparaging statement there was not expressly said to be untrue; it was only said generally that the libel was untrue, which it might be if only so much of it was untrue as contained praise of the defendants' own goods. On the general principle, therefore, that an untrue statement disparaging a man's goods, published without lawful occasion, and causing him special damage, is actionable, we give our judgment for the plaintiffs.

POLLOCK, B. I agree that our judgment in this case should be in favor of the plaintiffs. This case, no doubt, involves first principles. On the one hand, the law is strongly against the invention or creation of any rights of action, but, on the other hand, where a wrong has actually been suffered by one person in consequence of the conduct of another, one is anxious to uphold as far as possible the maxim "*ubi jus ibi remedium*." It seems to me the present case comes within that rule. Now, in the first place, this is not an action of libel. I think it is entirely distinguishable from that class of cases. It is alleged in the declaration that the matter complained of here was written. I think that makes no distinction. I will not say more upon that than that the difference between a written or verbal statement of the kind now complained of and an ordinary defamatory statement is very clearly pointed out by Tindal, C. J., in his judgment in *Malachy v. Soper*. This action is, I think, in the nature of an action of slander of title, and comes within the general rule laid down as to such actions in Comyns' Digest, where it is said that an action lies when special damage is shown. (Com. Dig. tit. Action on Case for Defamation, G 11.)

The only question, therefore, that seems to arise is, what is the fair intention of the words? It is alleged that the defendants were contriving and intending to injure the plaintiffs in their business, and that they falsely and maliciously printed and published the words in question. Now I do not attach any special meaning to the word "maliciously," except so far as it must be taken with the words "contriving and intending to injure the plaintiffs." I think that deprives the defendants of what I may call any legal occasion or opportunity on which they might use words of this kind. Therefore we have it stated that without legal occasion, without any necessity, the defendants have used language of and concerning the plaintiffs' goods which not only are false, but are such as to injure the plaintiffs in their business, and special damage is alleged. When all these things concur it seems to me a good cause of action is disclosed. With reference to the cases that have been cited, *Malachy v. Soper*, *Evans v. Harlow*,² and *Young v. Macrae*,³ I would only observe that, in the two first-mentioned cases,

¹ 3 B. & S. 264.

² 5 Q. B. 624.

³ 3 B. & S. 264.

there is no allegation of special damage, whilst the last is distinguishable on the grounds mentioned by my Brother Bramwell. Moreover, there the Chief Justice in his judgment¹ supposes a case very like the present one, and states that, in his opinion, an action would lie in such circumstances.

*Judgment for the plaintiffs.*²

WHITE, APPELLANT v. MELLIN, RESPONDENT.

1895. *Law Reports (1895), Appeal Cases*, 154.³

THE respondent was the proprietor of Mellin's food for infants, which he sold in bottles enclosed in wrappers bearing the words "Mellin's Infants' Food." The respondent was in the habit of supplying the appellant with these bottles, which the appellant sold again to the public after affixing on the respondent's wrappers a label as follows:—

"Notice.

"The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered. Sold in barrels, each containing 1 lb. nett weight, at 7½d. each, or in 7 lb. packets 3s. 9d. each. Local agent, Timothy White, chemist, Portsmouth."

The appellant was the proprietor of Vance's food. Discovering this practice, the respondent brought an action against the appellant, claiming an injunction to restrain him and damages.

At the trial before Romer, J., the plaintiff proved the above facts, and called two analysts and a physician, the result of whose evidence is stated in Lord Herschell's judgment. Briefly, they testified that in their opinion Mellin's food was suitable for infants, especially up to the age of six months, and persons who could not digest starchy matters, and that Vance's food was unsuitable for such beings, nay pernicious and dangerous for very young infants. At the close of the plaintiff's case Romer, J., being of opinion that the label was merely the puff of a rival trader and that no cause of action was disclosed, dismissed the action with costs. The Court of Appeal (Lindley, Lopes, and Kay, L. JJ.) being of opinion that the cause ought to have been heard out, discharged that judgment and ordered a new trial.⁴

Swinfen Eady, Q. C., and *Charles Macnaghten* for appellant.

Moulton, Q. C., and *Terrell*, for respondent.

¹ 3 B. & S. at p. 371.

² *Young v. Macrae*, 3 B. & S. 264; *Alcott v. Miller*, 21 T. L. R. 30; *Dooling v. Budget Co.*, 144 Mass. 258 (*semble*); *Boynton v. Shaw Co.*, 146 Mass. 219; *Wilson v. Dubois*, 35 Minn. 471; *Wier v. Allen*, 51 N. H. 177; *Snow v. Judson*, 38 Barb. 210; *Kennedy v. Press Co.*, 41 Hun, 422 (*semble*); *Paull v. Halferty*, 63 Pa. 46; *Young v. Geiske*, 209 Pa. 515 *Accord.* — ED.

³ [Arguments omitted; also the concurring opinions of LORDS WATSON, MACNAGHTEN, MORRIS, and SHAND. — ED.]

⁴ [1894] 3 Ch. 276.

LORD HERSCHELL, L. C. (after stating the facts) : —

My Lords, in the Court of Appeal Lindley, L. J., stated the law thus: "If upon hearing the whole of the evidence to be adduced before him the result should be that the statement contained in the label complained of is a false statement about the plaintiff's goods to the disparagement of them, and if that statement has caused injury to or is calculated to injure the plaintiff, this action will lie." Lopes, L. J., said: "All I desire to say is that, in my opinion, it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person and causing such other person damage, or likely to cause such other person damage."

None of the learned judges in the Court of Appeal dealt with the evidence which had been adduced on behalf of the plaintiff; but I think it must be taken that they had arrived at the conclusion that that evidence did bring the case within those statements of the law. Of course, if the plaintiff, on his evidence, had made out no case, he could not complain that the learned judge decided against him and did not hear the witnesses for the defendant; the action was in that case properly dismissed. I take it, therefore, that although the learned judges did not analyse the evidence or make any reference to it, they must have concluded that it established a case coming within the law as they laid it down. My Lords, as I understand, in the view of those learned judges, or in the view of Lindley, L. J., to take his statement of the law in the first place, it was necessary in order to the maintenance of the action that three things should be proved: that the defendant had disparaged the plaintiff's goods, that such disparagement was false, and that damage had resulted or was likely to result. Now, my Lords, the only statement made by the defendant by means of the advertisement is this: that Vance's food was the most healthful and nutritious for infants and invalids that had been offered to the public. The statement was perfectly general, and would apply in its terms not only to the respondent's infants' food but to all others that were offered to the public. I will take it as sufficiently pointed at the plaintiff's food by reason of its being affixed to a bottle of the plaintiff's food when sold, and that it does disparage the plaintiff's goods by asserting that they are not as healthful and as nutritious as those recommended by the defendant. The question then arises, Has it been proved on the plaintiff's own evidence that that was a false disparagement of the plaintiff's goods?

I will state what I understand to be the result of the plaintiff's evidence. Mellin's food for infants and invalids is a preparation of such a nature that the food is said to be predigested, and therefore not to make that call upon the digestion which food ordinarily does; that as regards children under six months of age Mellin's food is the only one which could be suitably used in the place of the ordinary means of nourishment, the mother's milk, and that any farinaceous food would at that age be not only not nutritious but prejudicial. And

so far, accepting the plaintiff's evidence for this purpose, there being no evidence to the contrary, the plaintiff, I think, establishes that his food was specially meritorious for that class of cases, and that it would not be correct to say that as regards these children of very tender age Vance's food or any other farinaceous food would be not only more healthful and nutritious, but as healthful and nutritious. But then it appears that when a child has passed the age up to which nutrition at the breast may ordinarily be said to continue, the use of some farinaceous food is not only not prejudicial but desirable, and that if the child were to be always brought up upon a food which would be suitable during the very earliest weeks or months, its digestion would be likely to suffer rather than benefit, and there would be not more, but less nourishment. After twelve months, as I understand the evidence, the farinaceous food would be distinctly better for the purposes of nutrition and health than this pre-digested food. That, my Lords, I take to be a fair statement of the result of the evidence. Can it be said, under those circumstances, that it is a false disparagement of the plaintiff's goods to say that this other preparation — Vance's — is more nutritious and healthful for infants and invalids? I put aside the question of invalids: upon that there was no evidence at all. The plaintiff did not say that his was more healthful, or that the defendant's was not more healthful. It is therefore unnecessary to consider the case of invalids, and it is enough to confine one's attention to the case of infants.

The word "infants" is not in ordinary parlance confined to children of very tender age. If one looks at its derivation etymologically it would apply to children so long as they are not able to articulate distinctly — not able to speak — and nobody would hesitate to refer to children, I should say, at least under two years of age as infants, just as much as they would to children under six months of age. Therefore, if you look at the class of infants as a whole, it is by no means shown that the statement that Vance's food is more nutritious and healthful than the plaintiff's food is false. If the reference had been specially to that very early period of life during which Mellin's food would be beneficial and the other prejudicial, no doubt a statement of that description might well be said to be a false statement; but looking fairly at the language used and the meaning to be attributed to it, I am not satisfied that it has been shown that by means of this advertisement the defendant falsely disparaged the plaintiff's goods. But, my Lords, assuming that he did so, the Court of Appeal regarded it as requisite for the maintenance of the action that something further should be proved, and that is that the disparaging statement has caused injury to or is calculated to injure the plaintiff. Upon that there is a complete absence of evidence. The plaintiff was called, but he did not state that he had sustained any injury, nor did he even say that it was calculated to injure him, and I own it seems to me impossible, in the absence of any such statement or evidence, to say

that it is a case in which such must be the necessary consequence; on the contrary, speaking for myself, I should doubt very much whether it was likely to be the consequence. After all, the advertisement is of a very common description, puffing, it may be, extremely and in an exaggerated fashion, these particular goods, Vance's food. That advertisement was outside the wrapper; inside was found an advertisement of Mellin's food, in which Mellin's food was stated to be recommended by the faculty as best for infants and invalids. Why is it to be supposed that any one buying this bottle at the chemist's would be led to believe that Mellin's food which he had bought was not a good article or not as good an article as another, merely because a person who obviously was seeking to push a rival article said that his article was better? My Lords, why should people give such a special weight to this anonymous puff of Vance's food, obviously the work of some one who wanted to sell it, as that it should lead him to determine to buy it instead of Mellin's food, which was said to be recommended by the faculty as the best for infants and invalids? I confess I do not wonder that the plaintiff did not insist that he had sustained injury by what the defendant had done. There is an entire absence of any evidence that the statement complained of either had injured or was calculated to injure the plaintiff. If so, then the case is not brought even within the definition of the law which Lindley, L. J., gives.

Lopes, L. J., adds the word "maliciously," that "it is actionable to publish maliciously without lawful occasion a false statement disparaging the goods of another person." By that it may be intended to indicate that the object of the publication must be to injure another person, and that the advertisement is not published *bonâ fide* merely to sell the advertiser's own goods, or at all events, that he published it with a knowledge of its falsity. One or other of those elements, it seems to me, must be intended by the addition of the word "maliciously." Both those are certainly absent here. There is nothing to show that the object of the defendant was other than to puff his own goods and so sell them, nor is there anything to show that he did not believe that his food was better than any other.

The only case which the learned counsel for the respondent was able to rely upon as at all approaching the present is the case of the Western Counties Manure Company v. Lawes Chemical Manure Company,¹ in which case a declaration was held good which alleged the disparagement of the plaintiffs' goods by stating that they were inferior to those sold by the defendants. In that case special damage was alleged in the declaration, and I think that that allegation was regarded by both the learned judges who were parties to the decision as material and essential. In the earlier case of Evans v. Harlow² a statement was complained of which distinctly disparaged the plaintiff's goods. It cautioned the public against them, it pointed out to

¹ L. R. 9 Ex. 212.

² 5 Q. B. 624.

the public that they were not likely to realize the purpose for which they were designed, and the allegation was that "the defendant published a libel of and concerning the plaintiff and of and concerning him in his said trade and of and concerning his design as follows." In that case there was no allegation of special damage; there was a demurrer to the declaration, and the declaration was held bad. Now, the only distinction that I can see between that case and the case of the Western Counties Manure Company v. Lawes Chemical Manure Company¹ is that in the latter case special damage was alleged, whereas in the former it was not. Bramwell, B., does not call specific attention to the differentia between the case before him and the case of *Evans v. Harlow*,² but he says that there is nothing in any of the cases inconsistent with the judgment which he is pronouncing. Pollock, B., who was the other judge, pointed out that in *Evans v. Harlow*³ there was no allegation of special damage. Therefore, my Lords, the utmost that the Western Counties Manure Company v. Lawes Chemical Manure Company¹ can be claimed as an authority for is this, that an action will lie for falsely disparaging another's goods where special damage results. *Evans v. Harlow*² is a distinct authority that it will not lie where special damage does not result. In the present case it cannot be pretended that any special damage was either alleged or proved.

Mr. Moulton sought to extricate himself from that difficulty in this way: he said that if this were an action for damages that might be a well-founded objection to it, but that it is not an action for damages but a claim for an injunction, and that although it may be that to support an action for damages it would be necessary to allege and prove special damage, that is not necessary where an injunction is claimed — that it is enough if a false statement is made and is likely to be repeated.

Now, my Lords, no authority was cited to show that a Court of Equity under any of the branches of its jurisdiction had ever granted or would grant an injunction in such a case. Certainly there is no rule of equity under which it may be said generally that a Court of Equity would restrain every publication of a false statement. In the case of *Canham v. Jones*⁴ the bill stated that a certain Mr. Swainson had been the sole proprietor of a secret for preparing the medicine called "Velno's Vegetable Syrup," and that the plaintiff had obtained title to it under his will and had sold the medicine. Then the complaint was that the defendant, who had been a servant of Swainson, was employed in the preparation of the syrup but was not acquainted with the complete preparation, certain essential ingredients being introduced only by Swainson himself and only in the presence of the plaintiff. Then it alleged "that the defendant being discharged from his service had made and advertised for sale a spurious preparation under the name of Velno's Vegetable Syrup, stated by him to be the

¹ L. R. 9 Ex. 218.

² 5 Q. B. 624.

³ 2 V. & B. 212.

same medicine in composition and quality as that made by Swainson and the plaintiff, the defendant's advertisement certifying that the medicine prepared by him at his residence under the name of Velno's Vegetable Syrup is precisely the same with that made and sold by the late Mr. Swainson." It was alleged that that was untrue, and that it was a spurious preparation pretending to be the same when it really was not. To that bill the defendant put in a general demurrer for want of equity. That demurrer was sustained by the Vice-Chancellor, Sir Thomas Plumer, although for the purposes of that demurrer it was taken that the defendant selling this article was falsely stating that it was the same as the plaintiff's.

My Lords, the learned counsel relied upon recent cases in which an injunction has been granted to restrain the publication of a libel, and he suggested that there had been a growth of equity jurisprudence which had brought within its ambit a class of cases which were previously not regarded as within it. But when the case in which the Court of Appeal laid down that an injunction might be granted to restrain the publication of a libel is looked at, it will be seen that the decision was not founded upon any principle or rule of equity jurisprudence, but upon the fact that a Court of Common Law could have granted such an injunction in an action of libel, and that since the Judicature Act the power which a Court of Common Law possessed in that respect is now possessed also by the Court of Chancery. That was distinctly the ground upon which the judgment was founded, that "the 79th and 82d sections of the Common Law Procedure Act 1854 undoubtedly conferred on the Courts of Common Law the power, if a fit case should arise, to grant injunctions at any stage of a cause in all personal actions of contract or tort, with no limitation as to defamation"; and then, inasmuch as those powers are now possessed by the Chancery Division, it was held that they likewise could in such cases grant an injunction. That was the decision in *Bonnard v. Perryman*.¹

My Lords, obviously to call for the exercise of that power it would be necessary to show that there was an actionable wrong well laid, and if the statement only showed a part of that which was necessary to make up a cause of action — that is to say, if special damage was necessary to the maintenance of the action, and that special damage was not shown — a tort in the eye of the law would not be disclosed, the case would not be within those provisions, and no injunction would be granted. I think, therefore, for these reasons, that the plaintiff would not be entitled to an injunction, any more than he would be entitled to maintain an action unless he established all that was necessary to make out that a tort had been committed; and for the reasons which I have given, taking the *Western Counties Manure Company v. Lawes Chemical Manure Company*² to be good law, he has not brought himself within it.

But, my Lords, I cannot help saying that I entertain very grave

¹ [1891] 2 Ch. 269.

² L. R. 9 Ex. 213.

doubts whether any action could be maintained for an alleged disparagement of another's goods, merely on the allegation that the goods sold by the party who is alleged to have disparaged his competitor's goods are better either generally or in this or that particular respect than his competitor's are. Of course, I put aside the question (it is not necessary to consider it) whether where a person intending to injure another, and not in the exercise of his own trade and vaunting his own goods, has maliciously and falsely disparaged the goods of another, an action will lie; I am dealing with the class of cases which is now before us, where the only disparagement consists in vaunting the superiority of the defendant's own goods. In *Evans v. Harlow*¹ Lord Denman expressed himself thus: "The gist of the complaint is the defendant's telling the world that the lubricators sold by the plaintiff were not good for their purpose, but wasted the tallow. A tradesman offering goods for sale exposes himself to observations of this kind, and it is not by averring them to be 'false, scandalous, malicious, and defamatory' that the plaintiff can found a charge of libel upon them. To decide so would open a very wide door to litigation, and might expose every man who said his goods were better than another's to the risk of an action." My Lords, those observations seem to me to be replete with good sense. It is to be observed that *Evans v. Harlow*¹ does not appear to have been decided on the ground merely that there was no allegation of special damage. The only judge who alludes to the absence of such an allegation is Patteson, J. No reference to it is to be found either in the judgment of Lord Denman or in the judgment of Wightman, J., the other two judges who took part in that decision; and I think it is impossible not to see that, as Lord Denman says, a very wide door indeed would be opened to litigation, and that the courts might be constantly employed in trying the relative merits of rival productions, if an action of this kind were allowed.

Mr. Moulton sought to distinguish the present case by saying that all that Lord Denman referred to was one tradesman saying that his goods were better than his rival's. That, he said, is a matter of opinion, but whether they are more healthful and more nutritious is a question of fact. My Lords, I do not think it is possible to draw such a distinction. The allegation of a tradesman that his goods are better than his neighbor's very often involves only the consideration whether they possess one or two qualities superior to the other. Of course "better" means better as regards the purpose for which they are intended, and the question of better or worse in many cases depends simply upon one or two or three issues of fact. If an action will not lie because a man says that his goods are better than his neighbor's, it seems to me impossible to say that it will lie because he says that they are better in this or that or the other respect. Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see

¹ 5 Q. B. 624.

rival cures advertised for particular ailments. The Court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure — whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better. As I said, advertisements and announcements of that description have been common enough; but the case of *Evans v. Harlow*¹ was decided in the year 1844, somewhat over half a century ago, and the fact that no such action — unless it be *Western Counties Manure Co. v. Lawes Chemical Manure Co.*² — has ever been maintained in the Courts of Justice is very strong indeed to show that it is not maintainable. It is, indeed, unnecessary to decide the point in order to dispose of the present appeal.

For the reasons which I have given I have come to the conclusion that the judgment of the court below cannot be sustained, even assuming the law to be as stated by the learned judges; but inasmuch as the case is one of great importance, and some additional color would be lent to the idea that an action of this description was maintainable by the observations in the court below, I have thought it only right to express my grave doubts whether any such action could be maintained even if the facts brought the case within the law there laid down.

Upon the whole, therefore, I think that the judgment of Romer, J., was right and ought to be restored and that this appeal should be allowed, with the usual result as to costs; and I so move your Lordships.

Order of the Court of Appeal reversed; Judgment of Romer, J., restored, with costs here and in the Court of Appeal; Cause remitted to the Chancery Division.

JOHNSON v. HITCHCOCK.

SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1818.

[Reported in 15 Johnson, 185.]

IN error, on *certiorari* to a justice's court.

This was an action on the case brought by the defendant in error against the plaintiff in error, for a disturbance of his right of ferry, and his use and enjoyment thereof, and hindering persons from crossing at the same. It appeared that the defendant below had endeavored to divert travellers from the ferry of the plaintiff, representing it not to be as good as another near it, and had, on many occasions, suc-

¹ 5 Q. B. 634.

² L. R. 9 Ex. 218.

ceeded. No evidence was offered on the part of the defendant, and the jury found a verdict for the plaintiff below, for twenty-two dollars and sixteen cents, on which judgment was rendered.

Per Curiam. It is clear, from the evidence, that the defendant below has, on many occasions, interfered, and prevented persons from crossing at the plaintiff's ferry; and if there is a good cause of action, the testimony shows an injury, probably, to the amount of the recovery. But there is no principle on which this action can be sustained. The evidence, imperfectly as it is stated, is sufficient to warrant the conclusion, that these are rival ferries near each other, and that the defendant below was unfriendly to the plaintiff's ferry, and endeavored to turn the custom to the other. This action does not appear to be founded on any slander of title, even admitting that an action of that kind might be sustained in a justice's court. Both ferries, from anything that appears to the contrary, have equal rights, and equal claims to be upheld and supported, and it cannot furnish a cause of action that travellers have been persuaded to cross the one rather than the other. If an action would lie in this case, it would in all cases of rival business, where any means are used to draw custom; and if this were once admitted, it would be difficult to know where to stop. The judgment must be reversed.

*Judgment reversed.*¹

¹ *Young v. Macrae*, 3 B. & S. 264 *Accord.* — *Ex.*

SECTION II. (*continued*).

(b) BY FRAUD.

BLOFELD v. PAYNE AND ANOTHER.

IN THE KING'S BENCH, JANUARY 12, 1833.

[*Reported in 4 Barnewall & Adolphus, 410.*]

CASE. The declaration stated that the plaintiff was the inventor and manufacturer of a metallic hone for sharpening razors, &c., which hone he was accustomed to wrap up in certain envelopes containing directions for the use of it, and other matters; and that the said envelopes were intended, and served, to distinguish the plaintiff's hones from those of all other persons; that the plaintiff enjoyed great reputation for the good quality of his hones, and made great profit by the sale thereof; that the defendants wrongfully and without his consent caused a quantity of metallic hones to be made and wrapped in envelopes resembling those of the plaintiff, and containing the same words, thereby denoting that they were of his manufacture, which hones the defendants sold so wrapped up as aforesaid, as and for the plaintiff's, for their own gain, whereby the plaintiff was prevented from disposing of a great number of his hones, and they were depreciated in value and injured in reputation, those sold by the defendants being greatly inferior. Plea, the general issue. At the trial before Denman, C. J., at the sittings in London after last term, it appeared that the defendants had obtained some of the plaintiff's wrappers, and used them as stated in the declaration; but no proof was given of any actual damage to the plaintiff. The questions left by his Lordship to the jury were, first, whether the plaintiff was the inventor or manufacturer? and, secondly, whether the defendants' hones were of inferior quality? but he stated to them that even if the defendants' hones were not inferior, the plaintiff was entitled to some damages, inasmuch as his right had been invaded by the fraudulent act of the defendants. The jury found for the plaintiff, with one farthing damages, but stated that they thought the defendants' hones were not inferior to his. Leave was reserved to move to enter a nonsuit.

Barstow now moved accordingly. The special damage alleged in the declaration was of the very essence of the case, and the plaintiff having failed to prove it, no ground of action remained. The whole struggle between the parties was, whether or not the defendants' hones were inferior to the plaintiff's, and the jury found that they were not. The declaration was not supported.

LITTLEDALE, J. I think enough was proved to entitle the plaintiff to recover. The act of the defendants was a fraud against the plaintiff; and if it occasioned him no specific damage, it was still, to a certain extent, an injury to his right. There must be no rule.

TAUNTON, J. I think the verdict ought not to be disturbed. The circumstance of the defendants' having obtained the plaintiff's wrappers, and made this use of them, entitles the plaintiff to some damages.

PATTESON, J. It is clear the verdict ought to stand. The defendants used the plaintiff's envelope, and pretended it was their own: they had no right to do that, and the plaintiff was entitled to recover some damages in consequence.

DENMAN, C. J., concurred.

*Rule refused.*¹

STONE AND OTHERS v. CARLAN AND OTHERS.

IN THE NEW YORK SUPERIOR COURT, 1850.

[Reported in 13 *Law Reporter*, 360.]

THE important facts of this case appear in the opinion of the court.

J. Graham, for defendants.

H. A. Mott and *J. F. Brady*, for plaintiff.

CAMPBELL, J. A motion is made for an injunction restraining the defendants from using the names "Irving Hotel," "Irving House," "Irving," &c., upon their coaches and upon certain badges worn by defendants upon their arms and hats. The complainants have an agreement with the proprietors of the Irving House, in this city, under which they are permitted to use the name of such proprietors, and the name of their hotel, upon their coaches and the badges of their servants; the complainants paying therefor a stipulated sum, and having also entered into bonds for the faithful discharge of these duties. All the porters are engaged in carrying passengers and their baggage to and from the hotels, boats, railroad depots, &c.

It was well remarked by the Master of the Rolls, in *Croft v. Day*,² that "No man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated upon a former occasion, that, in my opinion, the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud; and fraud may be practised against him by means of a name, though the person

¹ *Singleton v. Bolton*, 3 Doug. 293 (*semble*); *Sykes v. Sykes*, 3 B. & C. 541; *Morison v. Salmon*, 2 M. & G. 385; *Crawshaw v. Thompson*, 4 M. & G. 357 (*semble*); *Rodgers v. Nowill*, 5 C. B. 109 *Accord.* Compare *Glendon Co. v. Uhler*, 75 Pa. 467. —*Ed.*

² 7 Bevan, 84.

practising it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." I entirely concur in the foregoing views. The question is, whether the defendants have committed a fraud. I cannot doubt that their intention was to mislead, and to induce travellers to believe that they were servants of the proprietors of the Irving House. This is a large and popular hotel, well known in the country, and many a traveller may wish to resort to it on his arrival in this city, who, at the same time, may not know whether the carriages of the proprietors are painted red or white, or whether the exact designation is that of the Irving House or Irving Hotel. Such traveller may wish to intrust himself and his baggage to the servants of the hotel, feeling that, in doing so, he would be protected against loss or damage by the responsibility of the proprietors. Now, in this case, it can hardly be doubted but that the object of the defendant was to induce the belief on the part of the travellers that they were the servants of this hotel. To induce such belief, it was not necessary that the resemblance of all carriages and badges should be complete. From the very circumstances of the case, it would not be necessary to have a perfect resemblance, in order to commit even a gross fraud. It is not necessary to go, in this case, the length of the ordinary cases of trade-marks, though this case might come within the rules of those cases. (See *Coates v. Holluck*.¹) The false pretences of the defendants would, I think, necessarily tend to mislead. The defendants have a perfect right to engage in a spirited competition in conveyance of passengers and their baggage. They may employ better carriages than the plaintiffs. They may carry for less fare. They may be more active, energetic, and attentive. The employment is open to them, but "they must not dress themselves in colors, and adopt and bear symbols," which belong to others. I had some doubt, at the time of the argument, whether the complaint should not have been made by the proprietors of the Irving House; but, on further reflection, think that the suit is well brought. The plaintiffs are the real parties in interest. It is possible that, owing to the general liability of the proprietors, as innkeepers, for the loss of the property of guests, the proprietors might also be entitled to an injunction restraining the defendants from holding themselves out as the servants of the hotel.

An injunction must issue, as prayed for, against all the defendants.²

¹ 2 Sanford Ch. R., and Notes, and cases there cited.

² In *Marsh v. Billings*, 7 Cush. 322, under similar circumstances, the plaintiff recovered damages in an action at law.

See also articles in 4 Harv. L. Rev. 321; 5 Harv. L. Rev. 139. — Ed.

RIDING v. SMITH.

IN THE EXCHEQUER DIVISION, JANUARY 11, 1876.

[Reported in *Law Reports*, 1 *Exchequer Division*, 91.]

THE third¹ count was by the now plaintiff in his own right, and charged that he carried on business as a grocer and draper, and was assisted in the conduct of the same by his wife Margaret, and thereupon the defendant falsely and maliciously spoke and published of the said Margaret the words in the first count mentioned, whereby the plaintiff was injured in his business as a grocer and draper, and the persons named and many others ceased to deal with him.

The defendant pleaded not guilty and a justification.

At the trial it was proved that the words complained of were uttered in the presence of three or more persons. The person to whom they were addressed was on her way to the church of the district, where Joseph Abbott, who had been appointed to the incumbency, was about to read himself in. No evidence was given that any of the persons who heard the statement of the defendant had ceased to deal with the plaintiff, nor was there any evidence that particular persons had ceased to deal with the plaintiff, but there was evidence of a falling off in the profits of the business since the publication of the words complained of, and the plaintiff was unable to account for this falling off except as the consequence of the statements.

A verdict was found for the plaintiff for forty shillings, but leave was reserved to the defendant to move to enter a verdict for him or a nonsuit.

A rule *nisi* was accordingly obtained.

Ambrose, Q. C. (*H. W. Worsley* with him), showed cause.

Pope, Q. C., and *Crompton*, in support of the rule.

KELLY, C. B. I am of opinion that this rule should be discharged. At the trial, as the declaration originally stood, it was necessary to show that the slander was actionable either in itself, or else by reason of some special damage arising from it. But in the course of the case it was agreed that the wife of the plaintiff should be dismissed from the action, which then remained in substance not slander, but an action by the plaintiff, a trader, carrying on business, founded on an act done by the defendant which led to loss of trade and customers by the plaintiff. The action is this, that the defendant stated in the hearing of divers persons that the wife of the plaintiff, who assisted him in carrying on his business, had been guilty of adultery, so that customers ceased to deal at the shop. The two questions are, first, whether such an action is maintainable at all; and, secondly, whether it can be maintained without proof of something of the same kind as the special damage

¹ Only the report upon this count is given; the argument for the defendant and the concurring opinions of POLLOCK and HUDDLESTON, BB., are omitted. — Ed.

that would have to be proved in an action for slander. It appears to me, as to the first point, that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons from resorting to the place of business, and it so leads to loss of trade, it is actionable. It is of little consequence whether the wrong is slander, or whether it is a statement of any other nature calculated to prevent persons resorting to the shop of the plaintiff. Here the statement was that the wife of the plaintiff was guilty of adultery, and it is the natural consequence of such a statement that persons should cease to resort to the shop. Supposing the statement made not to be slander, but something else calculated to injure the shopkeeper in the way of his trade, as for instance a statement that one of his shopmen was suffering from an infectious disease, such as scarlet fever, this would operate to prevent people coming to the shop; and whether it be slander or some other statement which has the effect I have mentioned, an action can, in my opinion, be maintained on the ground that it is a statement made to the public which would have the effect of preventing their resorting to the shop and buying goods of the owner. Then the question is, whether such a statement would be actionable without proof of special damage. That was requisite in the cases of slander which have been cited, but it does not follow that it is necessarily so in such an action as the present. The cases show that in an action in respect of a statement made as to the wife or assistant of the plaintiff, the words would not be actionable as slander without proof of special damage, which must be established not merely by general evidence that the business has fallen off, but by showing that particular persons have ceased to deal with the plaintiff. I hope the day will come when the principle of *Ward v. Weeks*¹ and that class of cases shall be brought under the consideration of the court of last resort, for the purpose of determining whether a man who utters a slander in the presence of others is not responsible for all the natural effects which will arise from those persons going about and repeating the slander, though without any express authority on his part.

*Evans v. Harries*² is an authority that, in an action for slander for words spoken of the plaintiff in his trade or business, it is competent for him to prove a general loss of custom, although the declaration has alleged the loss of particular customers as special damage. So, here, I think it is sufficient to show that from the time of the injury being done the business has fallen off, and that it is unnecessary to prove that any particular persons have ceased to deal with the plaintiff. On both grounds, therefore, I think the plaintiff is entitled to succeed, and the rule must be discharged.

*Rule discharged.*³

¹ 7 Bing. 211.

² 1 H. & N. 251; 26 L. J. Ex. 31.

³ *Baldwin v. Flower*, 3 Mod. 120, *per* Wythens, J. *Accord.*

See also *Odgers*, Lib. & SL (2d ed.) 89-92. — Ed.

CHARLES HAMON v. JOSUÉ JOSUÉ GEORGE FALLE.

IN THE PRIVY COUNCIL, FEBRUARY 7, 8, 1879.

[*Reported in 4 Appeal Cases, 247.*]

APPEAL from a judgment of the Royal Court of the Island of Jersey (July 23, 1877).

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILLE:¹—

The plaintiff in this case is a master mariner holding a certificate from the Board of Trade. The defendant was, when the action was brought, the president of the Jersey Mutual Insurance Society for Shipping, and is sued as the representative of that society. The society is, as its name imports, a mutual insurance society for shipping, and is governed by the rules which were put in as part of the evidence before the court below, and are now before their Lordships. Some of those rules will have to be more particularly considered hereafter, but it is sufficient at present to state that the general course of business of the society seems to be that the different shipowners who become members of it underwrite each other's vessels in a certain proportion, and that the insurances effected are in the nature of time policies for one year.

The action is a peculiar one. The effect of the pleading in the nature of a declaration is as follows:—that the plaintiff holding the position which has been already mentioned, and having been employed as master of certain specified vessels, and in particular of the *Dora*, which then belonged to the late M. Félix Briard, his services were retained by M. James Sebire, the proprietor of the ship *Ulysses*; that he was getting ready to take the command of that vessel when he found that the insurance society had intimated to M. Sebire that if the plaintiff were to take command of her, the society would refuse to continue to insure her; that he then took certain steps in order to induce the society to reconsider their resolution, or to give him an opportunity of refuting the reasons they might have for it, but in vain; that by reason of this proceeding on the part of the society he had lost his employment, and that this arbitrary and vexatious conduct on the part of the society caused him considerable damage in depriving him of his employment, and consequently of the means of providing for and maintaining his family. And he prayed that the conduct of the society might be declared illegal, arbitrary, and vexatious, and that they might pay the damages claimed to the amount of £500.

In the first instance, the society took the proceeding which is set out in the record, which is partly in the nature of a demurrer; but also sets forth the resolutions of the committee under which the telegrams which had passed between them and M. Sebire were sent, and which were in fact the cause of the plaintiff's non-engagement as master of the vessel.

¹ The opinion of the court is somewhat abridged. — Ed.

The effect of this pleading was to submit that there was no ground of action. The court, however, considering that the course adopted by the society had caused considerable damage to M. Hamon in preventing him from following his profession as a master mariner; that the resolutions of the committee produced by the defendant contained no *motif* or reason to justify the proceeding which the committee had thought fit to adopt; and that such a proceeding, if adopted — “*sans cause ou raison valable*” — without cause or valid reason, would be an arbitrary and vexatious act, that would give a right of action to the person who was subject to it; decided that the society ought to suffer the consequences of its act, unless it furnished sufficient grounds or motives to justify its conduct. Leave was given to appeal to the full court, the court of greater number; but the defendants have never availed themselves of that permission. Mr. Benjamin has, in argument, fairly admitted that the declaration must be taken to disclose a *prima facie* cause of action; and that the only question is whether the plea or *prétention* which the defendants filed under the last-mentioned order has been proved, and if proved constitutes a valid defence.

That *prétention* is to be found in the record. In substance it pleads that the committee of administration only took the course they did in consequence of the information which they had received from sources respectable in themselves and worthy of belief, and which in the opinion of the committee established that M. Hamon, when in command of the ship *Dora*, belonging to Messrs. Félix Briard & Co., had been guilty of and had given way to intemperance, and had conducted himself in such a way as not to deserve the confidence of its owners, who had dismissed him from their service; that in those circumstances, the committee not being able to have confidence in M. Hamon, and thinking that an insurance was a purely voluntary act on their part, had decided not to expose the society to the risk of becoming responsible for the fate of a ship which would be placed under the command of a man whom they had reason to believe was addicted to a vice criminal in any case, but still more so in the case of a man holding the position of master of a vessel; that having taken that determination, the committee confined themselves to communicating to M. Sebire, without letting him know in terms the information which they had received on the subject of M. Hamon, whom, so long as they could protect the interests of the society, they had no desire to injure. It further states that in support of their *prétention* the defendants produced the letter from M. Briard, which is to be found in the evidence, and which they say was brought by M. Hamon to the office of the society only a few days before the date of the correspondence between M. Sebire and the committee, and they contend that that letter alone justifies fully the conduct of the society against Hamon, and that it was of a kind and of a nature to inspire doubt with reference to him and distrust of him, and that they cannot be bound to furnish legal proof of the conduct of Hamon whilst he had the command of the vessel *Dora*, but that it sufficed that they

should have reasonable grounds for refusing to place their interest at the risk of the conduct or acts of Hamon.

The effect of the defence thus pleaded is clearly that the defendants acted in good faith and without any malice towards the plaintiff, without any desire to injure him, and in the honest belief that the information they had received was sufficient to justify the course which they took. Their Lordships are of opinion that such a defence, if proved, is a sufficient answer to the *prima facie* cause of action disclosed by the declaration. The finding of the court that the act of the defendants would be arbitrary and vexatious, and that the defendants would be liable for damages unless they could show sufficient motives to justify what they did, points to that conclusion. Their Lordships further think that if the case is to be likened (as in the argument it has been) to an action for defamation it would fall within the rule thus laid down by Mr. Baron Parke in the case of *Toogood v. Spyring*: "In general an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned." In the present case their Lordships think that the representation made by the society to Sebire was clearly one made in the conduct of its own affairs, and in matters in which their own interest was concerned.¹

The plaintiff having been admitted to appeal *in forma pauperis*, there will of course be no order as to costs.

RATCLIFFE v. EVANS.

IN THE COURT OF APPEAL, MAY 26, 1892.

[Reported in *Law Reports* (1892), 2 *Queen's Bench*, 524.]

MOTION to enter judgment for the defendant, or for a new trial, by way of appeal from the judgment entered by Mr. Commissioner Bompas, Q. C., in an action tried with a jury at the Chester Summer Assizes, 1891.

The statement of claim in the action alleged that the plaintiff had for many years carried on the business, at Hawarden in the county of Flint, of an engineer and boiler-maker under the name of "Ratcliffe & Sons," having become entitled to the good-will of the business upon the death of his father, who, with others, had formerly carried on the business as "Ratcliffe & Sons;" that the defendant was the registered proprietor, publisher, and printer of a weekly newspaper called the "County Herald," circulated in Flintshire and some of the adjoining counties,

¹ *Bowen v. Matheson*, 14 All. 499 *Accord.* — *En.*

and that the plaintiff had suffered damage by the defendant falsely and maliciously publishing and printing of the plaintiff in relation to his business, in the "County Herald," certain words set forth which imported that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist.

At the trial the learned commissioner allowed the statement of claim to be amended by adding that "by reason of the premises the plaintiff was injured in his credit and reputation, and in his said business of an engineer and boiler-maker, and he thereby lost profits which he otherwise would have made in his said business." The plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication; but he gave no specific evidence of the loss of any particular customers or orders by reason of such publication. In answer to questions left to them by the commissioner, the jury found that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published *bona fide*; and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement. The commissioner, upon those findings, gave judgment for the plaintiff, for £120, with costs.

The defendant appealed.

Bowen Rowlands, Q. C., and *E. H. Lloyd*, for the appellant.

F. Marshall, for the respondent.¹

Cur. adv. vult.

The following judgment of the court (LORD ESHER, M. R., BOWEN, and FRY, L. JJ.), was read by

BOWEN, L. J. This was a case in which an action for a false and malicious publication about the trade and manufactures of the plaintiff was tried at the Chester assizes, with the result of a verdict for the plaintiff for £120. Judgment having been entered for the plaintiff for that sum and costs, the defendant appealed to this court for a new trial, or to enter a verdict for the defendant, on the ground, amongst others, that no special damage, such as was necessary to support the action, was proved at the trial. The injurious statement complained of was a publication in the "County Herald," a Welsh newspaper. It was treated in the pleadings as a defamatory statement or libel; but this suggestion was negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage. The only proof at the trial of such damage consisted, however, of evidence of general loss of business without specific proof of the loss of any particular customers or orders, and the question we have to determine is, whether in such an action such general evidence of dam-

¹ The arguments of counsel are omitted. — ED.

age was admissible and sufficient. That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title. To support it actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. It was contended before us that in such an action it is not enough to allege and prove general loss of business arising from the publication, since such general loss is general and not special damage, and special damage, as often has been said, is the gist of such an action on the case. Lest we should be led astray in such a matter by mere words, it is desirable to recollect that the term "special damage," which is found for centuries in the books, is not always used with reference to similar subject-matter, nor in the same context. At times (both in the law of tort and of contract) it is employed to denote that damage arising out of the special circumstances of the case which, if properly pleaded, may be superadded to the general damage which the law implies in every breach of contract and every infringement of an absolute right: see *Ashby v. White*.¹ In all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial. But where no actual and positive right (apart from the damage done) has been disturbed, it is the damage done that is the wrong; and the expression "special damage," when used of this damage, denotes the actual and temporal loss which has, in fact, occurred. Such damage is called variously in old authorities, "express loss," "particular damage:" *Cane v. Golding*; ² "damage in fact," "special or particular cause of loss:" *Law v. Harwood*,³ *Tasburgh v. Day*.⁴

The term "special damage" has also been used in actions on the case brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public, if his action is to be supported, such particular loss being, as is obvious, the cause of action: see *Iveson v. Moore*,⁵ *Rose v. Groves*.⁶ In this judgment we shall endeavor to avoid a term which, intelligible enough in particular contexts, tends,

¹ 2 *Ld. Raym.* 938; 1 *Sm. L. C.* 9th ed. p. 263, *per* *Holt, C. J.*

² *Sty.* 169.

³ *Cro. Car.* 140.

⁴ *Cro. Jac.* 484.

⁵ 1 *Ld. Raym.* 486.

⁶ 5 *M. & G.* 613.

when successively employed in more than one context and with regard to different subject-matter, to encourage confusion in thought. The question to be decided does not depend on words, but is one of substance. In an action like the present, brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—is evidence to show that a general loss of business has been the direct and natural result admissible in evidence, and, if uncontradicted, sufficient to maintain the action? In the case of a personal libel, such general loss of custom may unquestionably be alleged and proved. Every libel is of itself a wrong in regard of which the law, as we have seen, implies general damage. By the very fact that he has committed such a wrong, the defendant is prepared for the proof that some general damage may have been done. As is said by Gould, J., in *Iveson v. Moore*,¹ in actions against a wrong-doer a more general mode of declaring is allowed. If, indeed, over and above this general damage, further particular damage is under the circumstances to be relied on by the plaintiff, such particular damage must of course be alleged and shown. But a loss of general custom, flowing directly and in the ordinary course of things from a libel, may be alleged and proved generally. "It is not special damage"—says Pollock, C. B., in *Harrison v. Pearce*,²—"it is general damage resulting from the kind of injury the plaintiff has sustained." So in *Bluck v. Lovering*,³ under a general allegation of loss of credit in business, general evidence was received of a decline of business presumably due to the publication of the libel, while loss of particular customers, not having been pleaded, was held rightly to have been rejected at the trial: see also *Ingram v. Lawson*.⁴ Akin to, though distinguishable in a respect which will be mentioned from, actions of libel are those actions which are brought for oral slander, where such slander consists of words actionable in themselves and the mere use of which constitutes the infringement of the plaintiff's right. The very speaking of such words, apart from all damage, constitutes a wrong and gives rise to a cause of action. The law in such a case, as in the case of libel, presumes, and in theory allows, proof of general damage. But slander, even if actionable in itself, is regarded as differing from libel in a point which renders proof of general damage in slander cases difficult to be made good. A person who publishes defamatory matter on paper or in print puts in circulation that which is more permanent and more easily transmissible than oral slander. Verbal defamatory statements may, indeed, be intended to be repeated, or may be uttered under such circumstances that their repetition follows in the ordinary course of things from their original utterance. Except in such cases, the law does not allow the plaintiff to recover damages which flow, not from the original slander,

¹ 1 *Ld. Raym.* 486.

² 1 *Times L. R.* 497

³ 32 *L. T. (O. S.)* 298.

⁴ 6 *Bing N. C.* 312.

but from its unauthorized repetition: *Ward v. Weeks*,¹ *Holwood v. Hopkins*,² *Dixon v. Smith*.³ General loss of custom cannot properly be proved in respect of a slander of this kind when it has been uttered under such circumstances that its repetition does not flow directly and naturally from the circumstances under which the slander itself was uttered. The doctrine that in slanders actionable *per se* general damage may be alleged and proved with generality must be taken, therefore, with the qualification that the words complained of must have been spoken under circumstances which might in the ordinary course of things have directly produced the general damage that has in fact occurred. *Evans v. Harries*⁴ was a slander uttered in such a manner. It consisted of words reflecting on an inn-keeper in the conduct of his business spoken openly in the presence of divers persons, guests and customers of the inn — a floating and transitory class. The court held that general evidence of the decline of business was rightly receivable. "How," asked Martin, B., "is a public-house keeper, whose only customers are persons passing by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom?" *Mac-loughlin v. Welsh*⁵ was an instance of excommunication in open church. General proof was held to be rightly admitted that the plaintiff was shunned and his mill abandoned, though no loss of particular customers was shown. Here the very nature of the slander rendered it necessary that such general proof should be allowed. The defamatory words were spoken openly and publicly, and were intended to have the exact effect which was produced. Unless such general evidence was admissible, the injury done could not be proved at all. If, in addition to this general loss, the loss of particular customers was to be relied on, such particular losses would, in accordance with the ordinary rules of pleading, have been required to be mentioned in the statement of claim: see *Ashley v. Harrison*.⁶ From libels and slanders actionable *per se*, we pass to the case of slanders not actionable *per se*, where actual damage done is the very gist of the action. Many old authorities may be cited for the proposition that in such a case the actual loss must be proved specially and with certainty: *Law v. Harwood*.⁷ Many such instances are collected in the judgments in *Iveson v. Moore*,⁸ where, although there was a difference as to whether the general rule had been fulfilled in that particular kind of action on the case, no doubt was thrown on the principle itself. As was there said — in that language of old pleaders which has seen its day, but which connoted more accuracy of legal thought than is produced by modern statements of claim — "damages in the '*per quod*,' where the '*per quod*' is the gist of the action, should be shown certainly and specially." But such a doctrine as this was always subject to the qualification of good sense and of justice. Cases may

¹ 7 Bing. 211.

² 5 H. & N. 450.

³ 10 Ir. L. Rep. 19.

⁷ Cro. Car. 140.

² Cro. Eliz. 787.

⁴ 1 H. & N. 251.

⁶ 1 Esp. 50.

⁸ 1 Ld. Raym. 486.

here, as before, occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss. *Hartley v. Herring*¹ is probably a case of the kind, although it does not appear from the report under what circumstances, or in the presence of whom, the slanderous words were uttered. But if the words are uttered to an individual, and repetition is not intended except to a limited extent, general loss of custom cannot be ordinarily a direct and natural result of the limited slander: *Dixon v. Smith*,² *Hopwood v. Thorn*.³ The broad doctrine is stated in Buller's *Nisi Prius*, p. 7, that where words are not actionable, and the special damage is the gist of the action, saying generally that several persons left the plaintiff's house is not laying the special damage. Slanders of title, written or oral, and actions such as the present, brought for damage done by falsehoods, written or oral, about a man's goods or business, are similar in many respects to the last-mentioned class of slanders not actionable in themselves. Damage is the gist of both actions alike, and it makes no difference in this respect whether the falsehood is oral or in writing: *Malachy v. Soper*. The necessity of alleging and proving actual temporal loss with certainty and precision in all cases of the sort has been insisted upon for centuries: *Lowe v. Harewood*,⁴ *Cane v. Golding*,⁵ *Tasburgh v. Day*,⁶ *Evans v. Harlow*.⁷ But it is an ancient and established rule of pleading that the question of generality of pleading must depend on the general subject-matter: *Janson v. Stuart*,⁸ *Lord Arlington v. Merricke*,⁹ *Grey v. Friar*,¹⁰ *Westwood v. Cowne*,¹¹ *Iveson v. Moore*.¹² In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry. The rule to be laid down with regard to malicious falsehoods affecting property or trade is only an instance of the doctrines of good sense applicable to all that branch of actions on the case to which the class under discussion belongs. The nature and circumstances of the publication of the falsehood may accordingly require the admission of evidence of general loss of business as the natural and direct result produced, and perhaps intended to

¹ 8 T. R. 130.² 19 L. J. (C. P.) 95.³ Sty. 176.⁴ 5 Q. B. 624.⁵ 2 Saund. 412, n. 4.⁶ 1 Stark. 172.⁷ 5 H. & N. 450.⁸ W. Jones, 196.⁹ Cro. Jac. 484.¹⁰ 1 T. R. 754.¹¹ 15 Q. B. 907; see Co. Litt. 303 d.¹² 1 Ld. Raym. 486.

be produced. An instructive illustration, and one by which the present appeal is really covered, is furnished by the case of *Hargrave v. Le Breton*,¹ decided a century and a half ago. It was an example of slander of title at an auction. The allegation in the declaration was that divers persons who would have purchased at the auction left the place; but no particular persons were named. The objection that they were not specially mentioned was, as the report tells us, "easily" answered. The answer given was that in the nature of the transaction it was impossible to specify names; that the injury complained of was in effect that the bidding at the auction had been prevented and stopped, and that everybody had gone away. It had, therefore, become impossible to tell with certainty who would have been bidders or purchasers if the auction had not been rendered abortive. This case shows, what sound judgment itself dictates, that in an action for falsehood producing damage to a man's trade, which in its very nature is intended or reasonably likely to produce, and which in the ordinary course of things does produce, a general loss of business, as distinct from the loss of this or that known customer, evidence of such general decline of business is admissible. In *Hargrave v. Le Breton*¹ it was a falsehood openly promulgated at an auction. In the case before us to-day, it is a falsehood openly disseminated through the press—probably read, and possibly acted on, by persons of whom the plaintiff never heard. To refuse with reference to such a subject-matter to admit such general evidence would be to misunderstand and warp the meaning of old expressions; to depart from, and not to follow, old rules; and, in addition to all this, would involve an absolute denial of justice and of redress for the very mischief which was intended to be committed. It may be added that, so far as the decision in *Riding v. Smith* can be justified, it must be justified on the ground that the court (rightly or wrongly) believed the circumstances under which the falsehood was uttered to have brought it within the scope of a similar principle. In our opinion, therefore, there has been no misdirection and no improper admission of evidence, and this appeal should be dismissed with costs.

*Appeal dismissed.*²

DEAN DUDLEY v. RICHARD F. BRIGGS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 8, 1886.

[Reported in 141 *Massachusetts Reports*, 582.]

TORT. Writ dated Sept. 18, 1885. The declaration was as follows:

"And the plaintiff says that he is, and has been for many years, a compiler and publisher of directories of cities, towns, and counties in

¹ 4 Burr. 2422.

² [If, from the nature of the case, the amount of damage caused to a plaintiff by the tort of a defendant cannot be estimated with certainty, shall the defendant therefore be exonerated from liability? "Certainty, it is true, would thus be attained, but it would be the certainty of injustice." CHRISTIANCY, J., in *Allison v. Chandler*, 11 Michigan, 542, p. 555. See also, generally, pp. 553-556. — ED.]

this Commonwealth and elsewhere; that by care, attention, skill, and faithfulness, and after great labor and expense, he had acquired a large number of subscribers among business men and other people, throughout the cities and towns of Bristol County, and elsewhere in this Commonwealth, for 'The Bristol County Directory,' which the plaintiff has compiled and published biennially for many years, and until the acts and doings of the defendant hereinafter complained of; that, at great labor and expense, he had acquired a large and valuable list of advertisers in his said directory, from whom, as well as from the said subscribers to said directory, he obtained a large income, and would have continued to do so, but for the acts and doings of the defendant hereinafter alleged and set forth.

"And the plaintiff says that, according to his usual and ordinary custom in the compilation and publication of the said 'The Bristol County Directory,' he would have compiled and published the same in this year, A. D. 1885, and he made his preparations therefor, but he says that the defendant and his canvassers, and other servants and agents, in order to injure the plaintiff, and to deprive him of the opportunity of compiling and publishing said directory for said year of 1885, and thereafterwards, and receiving the gains and profits therefrom, and to secure the same to the defendant, together with all the gains and profits arising therefrom, and otherwise to injure the plaintiff and get gain, profit, and advantage to the defendant, knowingly and wilfully, falsely and fraudulently, pretended and represented to many persons, and particularly to the plaintiff's patrons, the advertisers in said directory and the subscribers thereto throughout said Bristol County, that the plaintiff had gone out of the business of compiling and publishing said directory, that the plaintiff had sold out said business to the defendant, that the said canvassers and the defendant's other servants and agents were compiling the materials for the plaintiff's directory, the same as formerly, and other false and fraudulent representations then and there made, of which the plaintiff is not yet fully informed, and thereby deceitfully and wrongfully induced the plaintiff's said patrons, advertisers, and subscribers, in and throughout said Bristol County, to give to the defendant their advertisements and subscriptions, and to pay him instead of the plaintiff therefor.

"Whereas, in truth and in fact, the said representations were wholly false and untrue; the plaintiff had neither gone out of the business of compiling and publishing the said directory, as he had done for years before, nor had he sold out to the defendant, nor had he any intention of doing so; nor were the defendant and his canvassers, and other agents and servants, compiling the said directory the same as formerly or for the plaintiff; all of which the defendant, as well as his said canvassers and other servants and agents, well knew. And the defendant did knowingly, wrongfully, injuriously, and deceitfully compile and publish the said 'The Bristol County Directory,' for the year A. D. 1885, and vend and sell the same to the plaintiff's patrons, advertisers, sub-

scribers, and other persons, as aforesaid. And the plaintiff says that thereby he has been prevented from compiling, publishing, and selling his said directory this year, A. D. 1885, as he has always done heretofore; that he has lost the great gains and profits which he would otherwise have made and received from the sale thereof, and from advertisers in and subscribers to said directory, and has been put to great loss and expense in preparing for said compilation and publication, till he learned of the defendant's said act and doings, and thereby he will be hereafter prevented from compiling and publishing said directory except at an increased expense and with diminished profits."

The defendant demurred to the declaration, on the ground that it did not set forth a legal cause of action.

The Superior Court sustained the demurrer; and ordered judgment for the defendant. The plaintiff appealed to this court.

J. C. Coombs and *N. U. Walker*, for the defendant.

S. H. Dudley, for the plaintiff.

FIELD, J. The plaintiff in his declaration does not allege that, by the acts of the defendant, he has been deprived of the benefit of any contract he had made, or of any property in existence and in his possession, or that the defendant published his directory for 1885 as a directory prepared and published by the plaintiff; and does not bring his case within such decisions as *Lumley v. Gye*, *Marsh v. Billings*,¹ *Thomson v. Winchester*,² *Blofeld v. Payne*, *Morison v. Salmon*,³ and *Sykes v. Sykes*.⁴

He does not allege that he had any copyright in the previous publications which the publication of the defendant infringed; and the courts of the Commonwealth have no jurisdiction over infringements of copyright. If each publication of a directory by the plaintiff every two years was a separate publication, then the plaintiff's declaration amounts to this, — that he intended to publish a directory for 1885, whereby he expected to make profits, but, by reason of the acts of the defendant, he abandoned such an intention, and lost the profits he otherwise would have made. But an intention in the mind of the plaintiff to compile and publish a directory is not property, and the abandonment of such an intention is not a loss of property. *Bradley v. Fuller*.⁵

An attempt has been made to bring this case within what is called slander of goods, manufactured and sold by another. See *Western Counties Manure Co. v. Lawes Chemical Manure Co.* This implies that the plaintiff was engaged in the business of making and selling directories, and that the defendant made statements disparaging the plaintiff's business. We think that the declaration does not show that the business of the plaintiff, in publishing a new directory every two years, was a continuous business. The directory to be published in 1885 was to be a new compilation and publication. From the nature

¹ 7 Cush. 322.

² 2 M. & G. 385.

⁵ 118 Mass. 239.

³ 19 Pick. 214.

⁴ 3 B. & C. 541.

of the book, perhaps this could not well be otherwise. New subscribers and new advertisements were to be obtained. We have been shown no case where it has been held that a false statement that the plaintiff had gone out of business, or sold out his business to the defendant, was an actionable slander of a person in his trade; but upon this we express no opinion. It may be said that such statements tend to injure a man in his business, because they tend to prevent customers from resorting to him for trade, and to injure the value of the good-will of his business. However this may be, the difficulty is in attaching good-will as a valuable thing to the publication every two years of a new directory. Such a directory could be published by anybody. It is perhaps a question of degree whether the publication by the plaintiff had been so frequent and regular that there can be said to be a good-will that would be protected in law. There is no allegation of any continuing contract, express or implied, of subscribing for, or advertising in, the directories, as a publication periodically issued; there is no allegation of any place of business to which customers resorted to purchase directories. Until the plaintiff had entered upon the compilation of the directory for 1885, we do not think that there was any business of publishing a directory for 1885 carried on by the plaintiff, or anything that, for example, could have been sold as a going concern by an assignee in insolvency, if the plaintiff had become an insolvent debtor. The cases upon liability for wrongful interference with the business of another are largely collected in *Walker v. Cronin*; but in that case there was an actual business, with the carrying on of which the defendant wrongfully interfered. The declaration in this case, indeed, alleges that the plaintiff made his preparations for compiling and publishing a directory for 1885, but it does not allege what those preparations were, or that they were anything valuable. The averment that he "has been put to great loss and expense in preparing for said compilation and publication," near the end of the declaration, appears to be a part of the damages.

The plaintiff cites *Swan v. Tappan*; ¹ but there the declaration was held insufficient, because there was no allegation of special damage. The declaration in the present case cannot well be distinguished in this respect from the declaration in *Swan v. Tappan*, but we do not deem it necessary to reconsider the decision in that case on this point. There, the plaintiff was actually engaged in selling his book, which had already been printed and put upon the market, and the action was the ordinary action for the malicious disparagement of the goods of another, manufactured and kept for sale.

The plaintiff relies upon *Benton v. Pratt*, ² which perhaps may be considered as an extreme case. See *Randall v. Hazelton*. In *Benton v. Pratt*, Seagraves and Wilson, at Allentown, had orally agreed to purchase of the plaintiff two hundred hogs, at the market price, if delivered

¹ 5 Oush. 104.

² 2 Wend. 385.

within three or four weeks, and they had not been previously supplied ; and, "about the time for the delivery," the plaintiff was proceeding with his drove of hogs to Allentown for the purpose of delivering to them two hundred hogs. The defendant, by his falsehood and deceit, intentionally prevented the performance of this contract, by persuading Seagraves and Wilson that the plaintiff was not intending to drive his hogs to Allentown, whereby they were induced to buy the hogs of the defendant, instead of buying the hogs of the plaintiff, as they otherwise would have done. The court say, that it was "not material whether the contract of the plaintiff with Seagraves and Wilson was binding upon them or not ;" but the agreement, if there was an agreement, although not in writing, was an actual offer by Seagraves and Wilson, not revoked, and which they would have performed, and the plaintiff was in the actual possession of the property which Seagraves and Wilson had offered to buy, and was actually proceeding to deliver this property to them, in accordance with their offer.

The fatal objection to the present case is, that it is entirely problematical whether the plaintiff would actually have published a directory if the defendant had not made the fraudulent misrepresentations alleged. The plaintiff abandoned his intention to compile and publish a directory in consequence of the defendant's acts ; but this, upon the principles stated in *Bradley v. Fuller*,¹ and the cases therein cited, is not sufficient to support an action.

Judgment affirmed.

MORASSE v. BROCHU.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 20, 1890.

[Reported in 151 *Massachusetts Reports*, 567.]

TORT for slander, by a physician against a Roman Catholic clergyman. Writ dated March 21, 1887. The declaration as amended was as follows : —

"The plaintiff says that, before the speaking of the words herein alleged he was, hitherto had been, and still is a physician in regular practice in Southbridge, having the reasonable skill and qualification proper and necessary for the practice of that calling, business, and profession, and had always conducted himself therein with great diligence, industry, and propriety, and had acquired and was acquiring thereby great gain and profit from the practice of his said calling, business, and profession. He further says, he then was and still is living in lawful wedlock, having been lawfully married ; that he then was and still is a person of culture and education, and a person of good moral character and a Christian man, and

¹ *Ubi supra.*

had always behaved himself with propriety, as a good citizen and a Christian, and was then and still is a person fit for social intercourse and association, professional relations, and practice among the members of the Notre Dame Roman Catholic Church in that place, and among all Christian people, and with defendant himself. Nevertheless, the plaintiff says the defendant, well knowing the premises aforesaid, but intending to bring the plaintiff into public contempt, infamy, and disgrace with and among all his neighbors and all the members of the church aforesaid, and to cause it to be believed by them and the said members of the said church that the plaintiff was a person of bad character, and unfit to be employed in his said calling, business, and profession, and an improper person for social intercourse and association among persons of good moral and religious character, and to cause the plaintiff to be deprived of and to lose his said practice in his said calling, business, and profession, and employment therein, and of the gains and profits thereof, and of his social rank and standing aforesaid, and to degrade, vex, harass, and annoy the plaintiff by influencing and preventing the members of said church from employing the plaintiff in his said calling, business, and profession, did heretofore, on a certain day, to wit, on or about the 27th day of February last past, in a certain discourse which the defendant then uttered in the said Notre Dame Roman Catholic Church, and before and in the presence and hearing of the members of said church then and there assembled and congregated, publicly, falsely, and maliciously speak and publish of the plaintiff, in the French language, to said members of the said church and congregation then and there assembled understanding said language, the words following: [here followed words in the French language:] that the words being translated into the English language have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say: —

“ ‘ During my absence there was a scandal of a marriage by law in this parish, and you know who this person is. On my return from Europe, when I first heard of it, I thought I would say nothing about it, because I supposed he would not have the sympathies of the people. But I see it is not so, and, on the contrary, this person is gaining the sympathies and favor of the people, and they are running after this person, and they give him the first places. Why do you run after him so? Not long ago I was invited to a party where that person was, and I refused to go, because I would not meet an excommunicated person. If any of you are sick and want my assistance, you need not send for me if this person is there, because I will not be under the same roof with him.’ ”

“ The plaintiff further says, that the defendant then and there, and by the words then and there spoken, as above alleged, publicly, falsely, and maliciously accused the plaintiff, in his said calling, business, and profession, of being a person who was unfit to associate with persons of good moral and religious character, and to be received and employed

by such persons, and unworthy of their favors, thereby meaning the plaintiff, and then and there understood to be the plaintiff, by the audience and congregation then and there present.

"And the plaintiff says, that by means of the said grievances so committed by the said defendant, the plaintiff is greatly injured in his good name, fame, and credit, and in his said trade, calling, and profession, and brought into public scandal, infamy, and disgrace with and among the members of said Catholic church, and other good and worthy persons, and that such members of said church, and other good and worthy persons, have hitherto, by reason thereof, wholly refused and still do refuse to have any transactions, or discourse, or acquaintance with the plaintiff, as they were before accustomed to have, or to employ the said plaintiff in his said trade, calling, and profession, and would otherwise have had and done, whereby the said plaintiff has been deprived of the society of such members of the said church, and other good and worthy persons, and of the profits, income, and emoluments of his said trade, profession, and employment as aforesaid."

The defendant demurred. The Superior Court overruled the demurrer.

At the trial before Thompson, J., the plaintiff testified that he was a physician engaged in the practice of his profession in Southbridge; that he was a member of the Roman Catholic church and of the parish of Notre Dame in Southbridge, of which the defendant was pastor; that his first wife obtained a divorce from him in February, 1886; that he was married again on May 3, 1886, at Southbridge, during the defendant's absence in Europe, by a justice of the peace; that by the canons of the Roman Catholic Church his act of marrying again excommunicated him from that church; that he did not attend church after the date of his second marriage; and that up to February 27, 1887, he was earning in his practice as a physician from eighteen hundred to two thousand dollars a year. The plaintiff was then permitted to testify, against the objection of the defendant, that there was a change in his business after February 27, 1887; that during the first week after that date he did not earn anything, and that subsequently he was not able to earn more than about one dollar per day, until at the end of four months he ceased to practice his profession in Southbridge.

Other witnesses testified to the words spoken by the defendant, and, while differing somewhat as to the exact words used by him, collectively testified substantially in support of all the words set forth in the declaration, and alleged to have been used by the defendant.

The judge refused to give instructions, requested by the defendant, but submitted the case to the jury under other instructions not excepted to, which permitted them to find that the words in question were spoken of the plaintiff in respect of his profession as a physician, and were defamatory and actionable *per se* without an averment of special damage.

The jury returned a verdict for the plaintiff, in the sum of \$1,500; and the defendant alleged exceptions.¹

¹ The statement of the case is abridged. — Ed.

J. Hopkins, for the defendant.

W. S. B. Hopkins, (*A. J. Bartholomew* with him), for the plaintiff.

C. ALLEN, J. 1. The defendant contends that there is no sufficient averment of special damages.¹

2. If there was a sufficient averment of special damages, then the question is, whether an imputation of the kind made by the defendant upon the plaintiff, when false, and when made for the express purpose of injuring the plaintiff in his profession, and when such injury is the probable and natural result of the speaking of the words, and when such injury actually follows, just as was intended by the defendant, will support an action by the plaintiff against the defendant.

It is sometimes said that it will not, unless the words are defamatory. But the better rule is, that such an imputation, whether defamatory of the plaintiff or not, will support an action under the circumstances above mentioned.² There are all the elements of a wrongful act deliberately done for the purpose of working an injury, and actually working one, even though the words have no meaning which, strictly speaking, could be called defamatory. *Riding v. Smith*, *Lynch v. Knight*,³ *Barley v. Walford*,⁴ *Green v. Button*,⁵ *Trenton Ins. Co. v. Perrine*.⁶ See also *Odgers, Libel and Slander*, 89, and at bottom of page 91, where the question is fully discussed. It may not be technically an action for slander, if the words are not defamatory; but the name of the action is of no consequence. In *Kelly v. Partington*,⁷ *Littledale, J.*, suggested the following illustration: "Suppose a man had a relation of a penurious disposition, and a third person knowing that it would injure him in the opinion of that relation, tells the latter a generous act which the first has done, by which he induces the relation not to leave him money, would that be actionable?" And Sir John Campbell answers, "If the words were spoken falsely, with intent to injure, they would be actionable." In *Odgers, Libel and Slander*, 90, the following illustration is given: "If in a small country town where political or religious feeling runs very high, I maliciously disseminate a report, false to my knowledge, that a certain tradesman is a radical or a dissenter, knowing that the result will be to drive away his customers, and intending and desiring that result, then, if such result follows, surely I am liable for damages in an action on the case, if not in an action of slander." In such a case there is an intentional causing of temporal loss or damage to another, without justifiable cause, and with the ma-

¹ The court held the averment of special damages to be sufficient, on substantially the same reasoning as that of the court in *Ratcliffe v. Evans*, *supra*, p. 642.

² *Lally v. Cantwell*, 30 Mo. Ap. 524 (*semble*); *Hammond v. Hussey*, 51 N. H. 40 (false statement by teacher that an applicant for admission to the high school was not properly qualified) *Accord*.

See especially, *Odgers, Lib. & Sl.* (2d ed.) 89-92. — Ed.

³ 9 H. L. Cas. 577, 600, *per Lord Wenleydale*.

⁴ 9 Q. B. 197.

⁵ 3 Zab. 402.

⁶ 2 C. M. & R. 707.

⁷ 5 B. & Ad. 645, 648.

licious purpose to inflict it, which will sustain an action of tort. *Walker v. Cronin*. And under this doctrine, in the opinion of a majority of the court, the present action may well stand.

3. But even if the averment of special damages is to be regarded as insufficient for want of naming the persons who would not employ the plaintiff as a physician, the question remains, whether the words are actionable *per se*, as containing a defamatory imputation upon the plaintiff; or, rather, whether there was enough in them to warrant the judge in submitting them to the jury.¹

Exceptions overruled.

PAUL K. RANDALL v. H. L. HAZELTON AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY, 1866.

[Reported in 12 Allen, 412.]

THE declaration in this action, which was brought in this court, contained one count in tort and one in contract.²

The first count, in tort, set forth in substance that the plaintiff was possessed of an interest in, and had the possession of, an estate in Boston, subject to a mortgage given by a former owner thereof to the New England Mutual Life Insurance Company, which contained a power of sale authorizing the said mortgagees and their assigns, in case of default by the mortgagor, to sell and dispose of the premises at public auction, on the premises, first giving notice of the time and place of sale by publishing the same three weeks in a newspaper in the county of Suffolk, and to make and deliver a deed thereof to the purchaser; that he duly and regularly paid the interest on the debt secured by the mortgage as it fell due; that before the principal fell due the mortgagees, in reply to an inquiry put by him, assured him that they did not want the money to be paid to them when it should become due, but would give him ample notice when they should desire such payment: that he relied upon such promise and made no provision for the payment of the debt, as he otherwise might easily and would have done; that the mortgagees never gave him notice that they desired payment of the principal; that the defendants, contriving and conspiring together to obtain control of the mortgage, in order to deprive the plaintiff of his property, falsely and maliciously represented to the mortgagees that he desired that the mortgage should be assigned to Edwin S. Merrill, whom they had requested to become the assignee thereof for their benefit, knowing said representation to be false; that they thereby

¹ The court answered this question in the affirmative. — Ed.

² The report upon the second count and the argument for the plaintiff are omitted. — Ed.

obtained from the mortgagees an assignment of the mortgage, and the mortgagees would not have assigned the same but for said fraudulent misrepresentations, and thereafter, the principal having become due, induced Merrill to appoint Nathan H. Hand, one of the defendants, as his agent, and the defendants thereupon privily entered upon the premises in the absence of the plaintiff and caused a certificate of their entry to be recorded, and afterwards caused an advertisement to be inserted in a newspaper of small circulation in the county of Suffolk, containing a notice of the time and place of sale of the premises, said advertisement being so expressed as not to indicate what real estate was thereby referred to; that the sale was accordingly made at an hour when the defendants knew that the plaintiff would be absent from home; and said Hand bought the same and took a conveyance thereof; that the plaintiff had no notice of the intended sale, or of the assignment of the mortgage, until after the completion of the sale, and he was compelled to pay to said Hand the sum of five hundred dollars to obtain a deed of the estate, and was otherwise injured.

The defendants demurred to the declaration, and the case was reserved by the Chief Justice for the determination of the whole court.

S. Bartlett and *G. S. Hale*, for the plaintiff.

J. P. Converse and *E. A. Kelly*, for the defendants.

COLT, J. The averment of conspiracy in the first count of the declaration cannot change the nature of the action, or add anything to its legal force and effect. The gist of the action is the tort committed and the damage resulting therefrom. To charge both defendants, it is necessary to prove a combination or joint action on their part, and the allegation of a conspiracy may be a proper mode of alleging such joint action; but for any other purpose it is wholly immaterial. If the action cannot be sustained against one of the defendants, then it must fail, although another person is included and a conspiracy alleged. *Parker v. Huntington*; ¹ *Hutchins v. Hutchins*.²

The question raised by the demurrer is whether, upon the facts charged, the action can be maintained. It is an ancient and well established legal principle that fraud without damage or damage without fraud gives no cause of action; yet when the two do concur, there is an action lieth. 3 Bulst. 95. Actions like the one under consideration are all based upon this proposition; but it cannot safely be applied as a test by which to determine whether the facts in any case constitute an actionable wrong, without keeping in mind the meaning which the law, by a series of judicial decisions, has attached to the terms used. It is well settled that every falsehood is not necessarily a legal fraud or false representation. It is said that a false representation is an affirmation of that which the party knows to be false or does not know to be true, to another's loss or his own gain. *Lobdell v. Baker*.³ So in

¹ 2 Gray, 125.

² 7 Hill, 104.

³ 1 Met. 201.

reference to the term "damage," the law is that it must be a loss brought upon the party complaining by a violation of some legal right, or it will be considered as merely *damnum absque injuria*. There is a large class of moral rights and duties, sometimes called imperfect rights and obligations, which the law does not attempt to enforce or protect. The refusal or discontinuance of a favor gives no cause of action. If one trusts to a mere gratuitous promise of favor from another and is disappointed, the law will not protect him from the consequence of his undue confidence, nor encourage carelessness or want of prudence in affairs. Damages can never be recovered where they result from a lawful act of the defendant. The exercise of a right conferred by a valid contract, in the manner provided by its terms, cannot be the ground of an action. The law will not inquire into the motives of the party exercising such right, however unfriendly and selfish. The trouble and expense and risk of loss ought to and must be presumed to have been contemplated when the contract was entered into. The foreclosure of a mortgage under a power of sale, for example, may be made at such time and under such circumstances as to cause great distress and sacrifice to the mortgagor; but, whatever the motive of the mortgagee, no remedy is afforded for his oppressive conduct, if the requirements of the contract have been fulfilled.

But a more important consideration in this connection is, that the damage which this doctrine contemplates must not only be caused by the fraud and misconduct of the defendant, but it must be the direct and immediate consequence of the wrongful act. The law looks to the proximate and not the remote cause of the injury. It were infinite, says Lord Bacon, to consider the causes of causes and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree. This is the only practical rule which, in view of the complication which surrounds this doctrine of causation, can be adopted in the administration of justice by human tribunals. Where the fraud and damage sustain this intimate relation of proximate cause and effect, and not otherwise, they are said to concur, in the sense of the proposition above stated.

Applying the doctrine thus explained to the plaintiff's case as stated in the first count, we are of opinion that he sets forth no legal cause of action. The declaration shows no consideration for the alleged promise of the mortgagees to inform the plaintiff, in case the amount of the debt should be wanted by them. It was an agreement not legally binding upon them. There was nothing in it to prevent them in law from proceeding to do all the acts in relation to advertising and selling the property which were done by the defendants; nor did it prevent them from assigning the mortgage. It cannot be said to be an invasion of any legal right for the defendants to deprive the plaintiff even by falsehood of the benefit of this gratuitous undertaking. *Hutchins v. Hutchins*. It is not alleged that the defendants knew of

the alleged promise of the mortgagees. The false representation of a material existing fact for the purpose of procuring the transfer might have enabled the mortgagees to avoid it, or maintain an action for any loss sustained by them, but until avoided the title passed to the defendant. If the declaration had contained averments of a good legal consideration for the promise to give the notice to the plaintiff, then it would seem to follow that the plaintiff's remedy would be ample against the mortgagees for all loss suffered by him by reason of the breach of their agreement, leaving them to whatever remedy they might have against the defendants for the fraud practised by them. And this fact is said by Morton, J., in *Lamb v. Stone*,¹ which was a case like this, to be good ground for refusing relief; for if the plaintiff "may have redress by any of the forms of actions now known and practised, it would be unwise and unsafe to sanction an untried one, the practical operation of which cannot be fully foreseen."

But the more important fact is, that this specific act of obtaining the assignment in the manner stated in itself produced no direct and immediate damage to the plaintiff. The damage resulted solely from the foreclosure and forced sale of the premises, and would have been no more and no less if the mortgage had not been assigned, and the mortgagees had pursued precisely the course charged upon the defendants in regard to the sale. It was undoubtedly a necessary step in order that the defendants might practise the alleged oppression; but it was not the immediate cause of the injury. The substantial, efficient and immediate cause of the loss to the plaintiff was the foreclosure and sale. And we are not permitted to go behind and inquire into the antecedent causes, near or remote. *Marble v. Worcester*; ² *Tisdale v. Norton*.³ We lay out of the case, therefore, that part of it which rests upon the false representations made to procure the transfer of the mortgage.

The cases cited by the plaintiff we think ought not to control us in this result. In *Benton v. Pratt*,⁴ the court say, "Here is the assertion of an unqualified falsehood with a fraudulent intent as to a present or existing fact, and a direct, positive and material injury resulting therefrom to the plaintiff." In the American note to *Pasley v. Freeman*,⁵ this case, it is said, certainly goes very far; but whether open to criticism or not in its main doctrine, it differs in the material point above indicated from the present case. So in *Green v. Button*,⁶ it was held that the damage to the plaintiff by delaying him in his work and injuring his credit directly resulted from the defendant's act. In the *Tunbridge Wells Dippers' Case*,⁷ while the court remark that there was a real damage in depriving the plaintiff of some gratuity, they also say in the same sentence that the injury was by disturbing the dippers in the exercise of their right or employment, which it seems by some private statute they were entitled to.

¹ 11 Pick. 532.

⁴ 2 Wend. 385.

⁶ Tyrwh. & Grang. 118.

² 4 Gray, 395.

⁵ 2 Smith's Lead. Cas. 153.

⁷ 2 Wils. 414.

³ 8 Met. 383.

The remaining features of the first count are more rapidly disposed of. They relate to acts of the defendants in connection with the entry, advertisement and sale of the property. It is not contended that these acts were not in compliance with the provisions of law and the power of sale. Indeed, the theory of the case is, that the sale was legal, and so the plaintiff was compelled to pay his money to repurchase the estate. As already suggested, no action can be maintained against one on account of the exercise of a legal right, whatever the motive that dictated such exercise. *Bragg v. Raymond*; ¹ *Lamb v. Stone*, *ubi supra*; *Wellington v. Small*; ² *Sedgw. on Dam.* (3d ed.) 31.

Demurrer sustained.

PETER O'CALLAGHAN v. MICHAEL CRONAN AND ANOTHER.

IN SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 10, 1876.

[Reported in 121 *Massachusetts Reports*, 114.]

TORT against Michael Cronan and John Cronan. The declaration was as follows:—

“The plaintiff says that on or about August 4, 1870, by articles in writing, duly executed by both parties thereto, he formed a copartnership with John Cronan, one of the defendants, in the business of making clothing and buying and selling ready-made clothing, and by the terms of said articles said copartnership was to continue five years from its date aforesaid, and, at the time of the grievances hereinafter set forth, the said copartnership had a long time, to wit, the period of about two years, to run, and said company had always done and were then doing a large and profitable business, and the plaintiff expected and had reasonable cause to expect that large profits would accrue to him from the continued business of said firm up to the end of said period. And the defendants heretofore, to wit, on or about October 10, 1873, with the unlawful purpose of forcing and compelling the plaintiff to withdraw from said firm and to dispose of his interest therein to them or one of them, unlawfully conspired together to accomplish said unlawful purpose, and in pursuance thereof, by false and malicious representations, and by other unlawful inducements offered to various creditors of said firm, procured said creditors to attach on several writs all the stock in trade belonging to said firm, and to represent to the attaching officer that said goods so attached were liable greatly to depreciate in value, and to petition said officer to sell said goods forthwith on said writs. And the plaintiff says that said creditors, by reason of said false and malicious representations and inducements, did attach all of said goods, and petition for the sale of the same on said several writs as aforesaid; and said defend-

¹ 11 Cnah. 274.

² 3 Cush. 148.

ants, in further pursuance of said unlawful purpose, induced said officer, and said officer threatened to sell all said goods in the lump, whereby the same were liable to be sacrificed and sold for much less than their true value. And the plaintiff says that by said unlawful means he was forced to and did withdraw from said firm against his will, and give up and surrender the large profits he reasonably hoped to make in the prosecution of said business in said firm, and sell and dispose of his interest in said goods for much less than its true value."

Michael Cronan died pending the action, and John Cronan demurred to the declaration on the ground that it set forth no cause of action.

In the Superior Court the demurrer was sustained, and judgment ordered for the defendant; and the plaintiff appealed to this court.

H. Fales, for John Cronan.

T. G. Kent, for the plaintiff.

GRAY, C. J. The allegations of conspiracy, illegality, falsehood and malice will not support this action, unless either the purpose intended, or the means by which it was to be accomplished, is shown to be unlawful. *Adler v. Fenton*; ¹ *Bowen v. Matheson*.² No such unlawfulness appears upon the face of this declaration. The purpose of compelling the plaintiff to withdraw from the firm was not in itself unlawful; and the means are not shown to be unlawful, for the plaintiff's creditors, upon the allegations in the declaration, had a lawful right to attach his property and to petition the officer to sell the goods attached. The declaration therefore shows no cause of action.

Judgment for the defendant.

W. B. HUTCHINS v. B. B. HUTCHINS, impleaded, &c.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1845.

[*Reported in 7 Hill, 104.*]

By the Court, NELSON, C. J.³ The case is substantially this: — The father of the plaintiff devised to him, in due form of law, a farm consisting of one hundred and fifty-one acres of land. The defendant, being aware of the fact, and intending to deprive the plaintiff of the benefit and advantage of the devise, and of his expected estate and interest in the farm, falsely and maliciously represented to the father, that, after his decease, the plaintiff intended to set up a large demand against the estate, which would absorb the greater part of it, and thus deprive the other children of their just share; at the same time defaming and calumniating the character of the plaintiff in several particulars. By these fraudulent means the defendant prevailed upon the father to

¹ 24 How. 407.

² 14 Allen, 499.

³ Only the opinion of the court is given, and that somewhat abridged. — Ed.

revoke and cancel the will, and to make and execute a new one, by which the plaintiff was excluded from all participation in his father's estate.

This is the substance of the case, in its strongest aspect, as presented by the pleadings; and the question arises whether any actual damage, in contemplation of law, is shown to have been sustained by the plaintiff?

Fraud without damage, or damage without fraud, gives no cause of action; but where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the cases referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable; and where the deprivation of any present substantial advantage, even though gratuitous, such as the loss of customers, of a permanent home at a friend's, or advancement in life, and such like, if the immediate and direct consequence of the words, will sustain the action.¹ If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that species of injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action.

But the law applicable to the cases referred to proceeds upon the

¹ 1 Starkie on Slander, 158 to 186, Ed. of 1843.

ground that the plaintiff, by the wrongful act complained of, has been deprived of the present, actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind, or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest which might indeed influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

Ordered accordingly.

HENRY H. LEWIS v. WM. L. CORBIN.

1907. 195 *Massachusetts*, 520.¹

ACTION OF TORT.

Demurrer to declaration.

H. G. Allen, for defendant.

W. H. Garland, for plaintiff.

KNOWLTON, C. J. This is an action of tort in which the defendant is charged with having deprived the plaintiff of a legacy, through his fraud in inducing a testatrix to execute the codicil by which the legacy purported to be given with only one witness, whereby the codicil was rendered invalid. The legatee named in the codicil was the plaintiff's father, who had deceased before the codicil was made, although neither the testatrix nor the defendant then knew of his death.

One question is whether this legacy, which would be void at common law (see *Maybank v. Brooks*, 1 Brown Ch. 76; *Dildine v. Dildine*, 32 N. J. Eq 78, 80; *Moss v. Helsley*, 60 Tex. 426, 436), is within the R. L. chap. 135, sec. 21, which provides that when a devise or legacy is made to a child or other relation of the testator who dies before the testator, leaving issue surviving the testator, such issue shall take the gift unless the will requires a different disposition of it.

We are of opinion that the purpose of the Legislature is best accomplished by holding the statute applicable to devises and legacies given to relations who died before the making of the will, as well as legacies and devises to those who died after the making of the will.

The defendant contends that the plaintiff's declaration fails to aver damage suffered by him on account of the defendant's misconduct. It is true, as he argues, that in order to create a liability of this kind,

¹ [Statement, and part of opinion, omitted. — Ed.]

there must be, not only a wrong inflicted by the defendant, but damage to the plaintiff resulting directly therefrom. *Lamb v. Stone*, 11 Pick. 527, 534, 535; *Wellington v. Small*, 3 Cush. 145, 149; *Bradley v. Fuller*, 118 Mass. 239, 241. See also *Jenks v. Hoag*, 179 Mass. 583, 585; *Freeman v. Venner*, 120 Mass. 424, 426, 427; *Adler v. Fenton*, 24 How. 408, 410.

In this case the averments are, in substance, that the defendant was the executor and residuary legatee named in a will of one Jane V. Corbin, and that she formed a purpose to give a legacy of \$5000 to Henry G. Lewis, the plaintiff's father, who was her second cousin, that she was over eighty years of age, and, for advice and assistance in matters of business, was dependent upon the defendant, who occupied a confidential relation towards her, that, wrongfully and fraudulently intending and contriving to defeat her will and intention, and to deprive and defraud Henry G. Lewis and his heirs of the sum of \$5000, he advised and procured the testatrix to execute a codicil to her will in the presence of only one witness, namely, the defendant, whereas the law of Rhode Island required the execution of the codicil in the presence of more than one witness, as the defendant well knew. It is then averred that the estate of the testatrix was large, and that, if the codicil had not failed for want of due attestation owing to the fraud practised by the defendant, the plaintiff would have received about \$1650.

Whether a person named as legatee has a remedy, in a case like this, is a question which, so far as we know, has never been decided in this Commonwealth. See *Melanefy v. Morrison*, 152 Mass. 473, 476. The testatrix, desiring to give the legacy and intending to express her desire in a way that would be effectual after her death, unless in the meantime she should change her purpose, was fraudulently induced to express it ineffectually, when she supposed that she had made a legal and valid codicil. Plainly such fraudulent conduct was a wrong upon the plaintiff as well as upon the testatrix. The question in the case is whether the plaintiff has averred sufficient facts to show that damage resulted to him directly as a consequence of the wrong. The defendant relies strongly upon *Hutchins v. Hutchins*, 7 Hill, 104, decided by the Supreme Court of New York. The declaration in that case charged that the plaintiff's father had made a will devising a farm to the plaintiff, and that the defendants, who were interested in the testator's estate, he being a feeble man, advanced in years, and incapable of transacting business, fraudulently induced him to make another will in which the devise to the plaintiff was omitted. The case was heard on a demurrer. The court said, "Fraud without damage, or damage without fraud gives no cause of action; but where both concur, an action lies. . . . The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property, and this cannot be said to have conferred a right of any kind. To hold otherwise and sanction the doctrine contended for by the plaintiff would be next to saying that every voluntary courtesy was matter of legal obligation, and that private thoughts and intentions concerning

benevolent or charitable distributions of property might be seized upon as the foundation of a right which the law would deal with and protect. . . . But the law applicable to the cases referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best the contemplated gift was not to be received until after the death of the plaintiff, or the testator might change his mind, or lose his property." This case has been cited with approval in this Commonwealth and elsewhere. *Randall v. Hazelton*, 12 Allen, 412, 416; *Emmons v. Alvord*, 177 Mass. 466, 471; *Adler v. Fenton*, 24 How. 408, 410. We have been referred to no other decision upon similar facts, and we have found no other. It seems pretty plain that, if a suit were brought in the lifetime of the testator, immediately after the practice of the fraud, no substantial damage could be recovered. Very likely the court was right in deciding that no action could be maintained. The plaintiff's relation to the subject to which the fraud was directed was not close enough to cause him pecuniary loss, apart from the happening of subsequent events. Even if there were no fraud the legacy might never take effect. The testator might lose his property, or destroy his will, or make a different one. But the fraud put the plaintiff in a less advantageous position than he otherwise would have occupied in reference to the probability of receiving property under the will, and this change of position, accomplished by a fraud, naturally and probably might deprive him of that which, with fair dealing, he would receive. It seems to us that, while the fraud does not cause substantial damage apart from the happening of subsequent events which reasonably may be expected to happen, if these do happen, the defendant is chargeable with the natural consequences of his act. Suppose, in the present case, that the testatrix did not change her purpose to give the legacy of \$5000 to Henry G. Lewis, and that for the rest of her life she desired and intended that this legacy should take effect, and thought that it would take effect. The fraud then would be operative up to the time of her death, and would accomplish the result intended by its author, by depriving the legatee of that which otherwise he would have received. It is averred that the testatrix left an estate sufficient to pay all or nearly all of this legacy, with the others. If the facts supposed above are proved, does it not follow that the fraud directly and proximately caused the plaintiff's loss of his legacy? The defendant cannot complain that these supposed facts followed as conditions concurring with his fraud to cause the damage. His fraud was planned in reference to the probability that these events would follow. In *Hutchins v. Hutchins*, *supra*, there was no averment to show that the fraud was operative up to the time when the title to the property was changed by the death of the testator. The court treated the case as if the testator might have changed his purpose as to the disposition of his estate, for reasons of his own independently of the fraud.

While the declaration in the present case declares a result which might justify an inference that the loss was caused by the fraud alone, the averment seems hardly more than a statement of a conclusion of law from the facts given previously. Upon demurrer we think the pleading is defective in not averring facts which exclude the possibility that the testatrix changed her purpose in regard to this legacy, and which show that the fraud continued operative to the time of her death, and thus caused the loss to the plaintiff.

We think the charge of fraud is a sufficient statement of an actionable wrong. It charges much more than an expression of opinion by which the testatrix was misled. The defendant is accused of having dealt with a matter of fact, and with having fraudulently procured the making of the codicil without sufficient attestation of it.

We infer from the record that the testatrix was domiciled in Massachusetts, and that the construction of the will is governed by the law of this State. *Welch v. Adams*, 152 Mass. 74, 79; *Sewall v. Wilmer*, 132 Mass. 131, 136. *Demurrer sustained.*

HERMAN RICE AND OTHERS v. WILBUR J. MANLEY.

IN THE COURT OF APPEALS, NEW YORK, 1876.

[Reported in 66 *New York Reports*, 82.]

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiffs, entered upon the report of a referee. (Reported below, 2 Hun, 492.)

Wilkes Angel, for the appellants.

J. R. Jewell, for the respondent.¹

EARL, J. The plaintiffs had made an agreement with one Stebbins to purchase from him a large quantity of cheese, to be delivered at a future day, at Cattaraugus station, Cattaraugus County. There had been no compliance with the Statute of Frauds so as to make the agreement binding upon either party, but both parties would have performed it but for the fraud of the defendant. The defendant knowing of the agreement, for the fraudulent purpose of defeating its performance by Stebbins, of depriving the plaintiffs of the benefit thereof, and of himself obtaining the cheese, caused a telegraphic dispatch to be sent to Stebbins, signed by the name of E. Rice, which he meant Stebbins should understand to be the name of one of the plaintiffs, to the effect that he could sell the cheese and plaintiffs did not care for it. He took the dispatch from the telegraph office and carried it to Stebbins, and by this fraud induced Stebbins to sell and deliver the cheese to him before the day of delivery to the plaintiffs arrived. The referee held that defendant was liable to the plaintiffs for the damages sustained by them in consequence of this fraud; but the General Term reversed the judgment, holding, upon the authority of the case of *Dung v. Parker*,² that the

¹ The arguments of counsel are omitted. — Ed.

² 52 N. Y. 494.

plaintiffs could recover no damage, because the agreement for the sale of the cheese to the plaintiffs, by Stebbins, was void by the Statute of Frauds.

It was said by Coke, J. (in 3 Bulst. 95), that "fraud without damage, or damage without fraud, gives no cause of action; but when these two concur an action lies." This language has been frequently quoted with approval by judges and text writers, and the rule as thus laid down is generally applicable to the multifarious forms of fraud which come before the courts. Fraud and falsehood are *mala in se*, and wrongful in the eye of the law, so that if damage results therefrom there is the damage and wrong necessary to create a cause of action. *Ad. on Law of Torts*, 25. In 2 *Hilliard on Torts*, 75, the learned author lays down the rule as follows: "In order to maintain an action for fraud, it is sufficient to show that the defendant knowingly uttered a falsehood with the design to deprive the plaintiff of a benefit and acquire it to himself;" and it must also be added that plaintiff was deceived and damaged.

What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage, so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract. Suppose a testator designed to give A a legacy, and was prevented from doing it solely by the fraud of B; in such case, while A has no right to the legacy which he can enforce against the estate of the testator, yet both law and equity will furnish him appropriate relief against B, depending upon the facts of the case. *Kerr on Frauds*, 274, and cases cited; *Bacon Ab.*, Fraud, B. Suppose A made a parol contract with B for the purchase of land, and B is ready and willing to convey, but is prevented from so doing by the fraudulent representations of C as to A, by which B is deceived and induced to convey to C; in such case, although A could not have compelled B to give him the conveyance, it would be a reproach to the law to hold that C would not be liable to A for the damage caused by the fraud.

The case of *Benton v. Pratt*¹ is quite in point, and is conceded by the learned judge who wrote the opinion of the General Term to be a controlling authority for the maintenance of this action if not overruled.

In that case *Seagraves & Wilson*, of Allentown, Penn., had made a contract with the plaintiffs to purchase of him, to be delivered at a future day, twenty hogs, nothing having been done to make the con-

¹ 2 Wend. 335.

tract binding within the Statute of Frauds. While the plaintiff was driving his hogs and thus preparing to perform his contract, the defendants, knowing the facts, drove their hogs to Allentown, and fraudulently represented that plaintiff did not intend to deliver his hogs to Seagraves & Wilson, and thus induced them to buy their hogs; and when plaintiff arrived with his hogs, Seagraves & Wilson refused to take them solely because they had a full supply. That was a case where the plaintiff could not have enforced his contract against Seagraves & Wilson, and yet the court held that he could maintain an action of fraud against the defendants for damages sustained on account of the fraud. Judge Sutherland said: "There is the assertion on the part of the defendant of an unqualified falsehood, with a fraudulent intent as to a present or existing fact, and a direct, positive, and material injury resulting therefrom to the plaintiff. This is sufficient to sustain the action." He also said: "It is not material whether the contract of the plaintiff with Seagraves & Wilson was binding upon them or not; the evidence established beyond all question that they would have fulfilled it but for the false and fraudulent representations of the defendants."

In *Snow v. Judson*,¹ it was held that false statements made by an individual in regard to articles manufactured by others, for the purpose of preventing sales by them of such articles, which do in fact prevent such sales and injure the manufacturers in their business, constituted a cause of action. It has been held in many cases that a false representation, made with intent to injure one, and in relying on which he is injured, is a good cause of action, although no benefit accrues to the party making it, from the falsehood. *Pasley v. Freeman*,² *White v. Merritt*.³ In the latter case it is said that the action will lie whenever there has been the assertion of a falsehood with a premeditated design, as to a fact, when a direct and positive injury arises from such assertions; and *Benton v. Pratt* is cited as authority. In *Green v. Button*,⁴ the plaintiff had made a contract for the purchase of spruce battens for £11; upon the case, as presented to the court, the battens had not been delivered or paid for. The defendant, who had loaned the plaintiff the money to pay for the battens, went to the sellers and falsely and fraudulently represented, among other things, that he had a lien on the battens, and ordered and directed them not to deliver them. The sellers, being deceived by the representations, were induced not to deliver the battens, and the plaintiff suffered damage; and it was held that an action for the fraud could be maintained, although the sellers were under no obligation to deliver the battens.

The mere forms adopted for the perpetration of frauds are of little importance; it matters not whether the false representations be made to the party injured or to a third party, whose conduct is thus influenced

¹ 38 Barb. 210.

² 7 N. Y. 352.

³ 3 Term R. 51.

⁴ 2 C. M. & R. 707.

to produce the injury, or whether it be direct or indirect in its consequences. Schemes of fraud may be so cunningly devised as to elude the eye of justice, but they must not escape condemnation and reparation when discovered.

The case of *Dung v. Parker* is not in conflict with these views, and it was not there intended to overrule the case of *Benton v. Pratt*. In that case the defendant falsely represented that he had authority to lease, as agent for another, certain premises, and as such agent he contracted by parol to lease the premises to the plaintiff for the term of two years; in consequence of which plaintiff incurred expense to procure fixtures to fit up the premises. It was held that the plaintiff could not recover. In that case the parol lease was void under the Statute of Frauds, and if the defendant had possessed full authority to lease the premises, or if the contract had been made directly with the owner of the premises, it would have been without legal force or validity; and it was upon this ground that plaintiff was defeated. The rule was laid down, "that an agent, who falsely represents his authority to make a contract on behalf of another, is not liable in contract or tort, unless the principal would have been bound by the contract made if the agent had such authority." There was no proof that plaintiff could have procured a valid lease. But if it had been shown that the owner had agreed to give the lease and was willing to do so, and was prevented by the fraud of the defendant, a case would have been presented like this, and a different result would have been reached.

The order of the general term must be reversed, and judgment upon report of referee affirmed, with costs.

All concur.

*Order reversed, and judgment accordingly.*¹

WILLIAM P. HUGHES v. JAMES McDONOUGH.

SUPREME COURT OF JUDICATURE, NEW JERSEY, NOVEMBER, 1881.

[*Reported in 43 New Jersey Reports, 459.*]

ON writ of error.

The substance of the declaration was, that the plaintiff was a blacksmith and horseshoer by trade, of good character, &c.; that he had obtained the patronage of one Peter Van Riper, and that on a certain occasion he shod a certain mare of the said Van Riper in a good and workmanlike manner; that the defendant, maliciously intending to injure the plaintiff in his said trade, &c., "did wilfully and maliciously mutilate, impair and destroy the work done and performed by the said plaintiff upon the mare of the said Van Riper, without the knowledge

¹ *Benton v. Pratt*, 2 Wend. 385; *Rich v. N. Y. Co.*, 87 N. Y. 382, 398; *N. Y. Co. v. Chapman*, 118 N. Y. 288, 294 *Accord.* — Ed.

of the said Van Riper, by loosing a shoe which was recently put on by the said plaintiff, so that if the mare was driven, the shoe would come off easily, and thus make it appear that the said plaintiff was an unskilful and careless horseshoer and blacksmith, and that the said mare was not shod in a good and workmanlike manner, and thus deprive the said plaintiff of the patronage and custom of the said Van Riper."

The second count charges the defendant with driving a nail in the foot of the horse of Van Riper, after it had been shod by the plaintiff, with the same design as specified in the first count.

The special damage laid was the loss of Van Riper as a customer.

Argued at June term, 1881, before Beasley, Chief Justice, and Justices Scudder, Knapp and Reed.

For the plaintiff in error, *W. B. Guild, Jr.*

For the defendant, *S. Kalisch.*

The opinion of the court was delivered by

BEASLEY, C. J. The single exception taken to this record is, that the wrongful act alleged to have been done by the defendant does not appear to have been so closely connected with the damages resulting to the plaintiff as to constitute an actionable tort. The contention was, that the wrong was done to Van Riper; that it was his horse whose shoe was loosened, and whose foot was pricked, and that the immediate injury and damage were to him, and that, consequently, the damages of the plaintiff were too remote to be made the basis of a legal claim.

But this contention involves a misapplication of the legal principle, and cannot be sustained. The illegal act of the defendant had a close causal connection with the hurt done to the plaintiff, and such hurt was the natural and almost direct product of such cause. Such harmful result was sure to follow, in the usual course of things, from the specified malfeasance. The defendant is conclusively chargeable with the knowledge of this injurious effect of his conduct, for such effect was almost certain to follow from such conduct, without the occurrence of any extraordinary event, or the help of any extraneous cause. The act had a twofold injurious aspect: it was calculated to injure both Van Riper and the plaintiff; and as each was directly damaged, I can perceive no reason why each could not repair his losses by an action.

The facts here involved do not, with respect to their legal significance, resemble the juncture that gave rise to the doctrine established in the case of *Vicars v. Wilcocks*.¹ In that instance the action was for a slander that required the existence of special damage as one of its necessary constituents, and it was decided that such constituent was not shown by proof of the fact that as a result of the defamation the plaintiff had been discharged from his service by his employer before the end of the term for which he had contracted. The ground of this decision was that this discharge of the plaintiff from his employment was illegal, and was the act of a third party, for which the defendant

¹ 8 East, 1.

was not responsible, and that, as the wrong of the slander became detrimental only by reason of an independent wrongful act of another, the injury was to be imputed to the last wrong, and not to that which was farther distant one remove. In his elucidation of the law in this case, Lord Ellenborough says, alluding to the discharge of the plaintiff from his employment, that it "was a mere wrongful act of the master, for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seized the plaintiff and thrown him into a horse-pond by way of punishment for his supposed transgression." The class of cases to which this authority belongs, rests upon the principle that a man is responsible only for the natural consequences of his own misdeeds, and that he is not answerable for detriments that ensue from the misdeeds of others. But this doctrine, it is to be remembered, does not exclude responsibility when the damage results to the party injured through the intervention of the legal and innocent acts of third parties; for, in such instances, damage is regarded as occasioned by the wrongful cause, and not at all by those which are not wrongful. Where the effect was reasonably to have been foreseen, and where, in the usual course of events, it was likely to follow from the cause, the person putting such cause in motion will be responsible, even though there may have been many concurring events or agencies between such cause and its consequences. This principle is stated, and is illustrated by a reference to a multitude of decisions in *Cooley on Torts*, 70, *et seq.* . . .¹

The principles thus propounded must have a controlling effect in the decision of the question now before this court, as they decisively show that the damage of which the plaintiff complained was not, in a legal sense, remote from the wrongful act. What, in point of substance, was done by the defendant, was this: he defamed, by the medium of a fraudulent device, the plaintiff in his trade, and by means of which defamation, the latter sustained special detriment. If this defamation had been accomplished by word spoken or written, or by signs or pictures, it is plain the wrong could have been remedied, in the usual form, by an action on the case for the slander; and, plainly, no reason exists why the law should not afford a similar redress when the same injury has been inflicted by disreputable craft. It is admitted upon the record that the plaintiff has sustained a loss by the fraudulent misconduct of the defendant; that such loss was not only likely, in the natural order of events, to proceed from such misconduct, but that it was the design of the defendant to produce such result by his act. Under such circumstances it would be strange indeed if the party thus wronged could not obtain indemnification by an appeal to the judicial tribunals.

¹ The learned judge here discussed *McDonald v. Snelling*, 14 All. 290, and *Rigby v. Hewitt*, 5 Ex. 242, and cited 2 Para. Cont. 456; *Dixon v. Fawcus*, 30 L. J. Q. B. 187; *Tarleton v. McGawley*, Peake, 270; *Bell and Midland Co.*, 10 C. B. N. S. 307; *Keeble v. Hickeringill*, 11 East, 574, n. — ED.

EVANS v. WALTON.

IN THE COMMON PLEAS, JUNE 11, 1867.

[*Reported in Law Reports, 2 Common Pleas, 615.*]

THE first count of the declaration stated that Louisa Evans was and still is the servant of the plaintiff in his business of a publican and victualler; and that the defendant, well knowing the same, wrongfully enticed and procured the said Louisa Evans unlawfully and without the consent and against the will of the plaintiff, her said master, to depart from the service of the plaintiff; whereby the plaintiff had lost the service of the said Louisa Evans in his said business.

Pleas: Not guilty; and that Louisa Evans was not the servant of the plaintiff, as alleged. Issue thereon.

The cause was tried before Pigott, B., at the last Spring Assizes at Oxford. The plaintiff was a licensed victualler in Birmingham, and was assisted in his business by his daughter Louisa, a girl about nineteen years of age, who served in the bar and kept the accounts. On the 10th of November, 1866, the daughter, with her mother's permission, which was procured by means of a fabricated letter purporting to be an invitation to her to spend a few days with a friend at Manchester, left the plaintiff's house and went to a lodging-house in the neighborhood of Birmingham, where she cohabited with the defendant, at whose dictation the above-mentioned letter had been written. On the 19th of November the daughter returned home, and resumed her duties for a short time, but ultimately left her home again, and on the 9th of February was again found cohabiting with the defendant at the same lodging-house.

On the part of the defendant it was submitted that, in order to sustain the action, in the absence of an allegation that the defendant had debauched the plaintiff's daughter, it was necessary to show a binding contract of service.

The learned Baron, after consulting Blackburn, J., intimated an opinion that the action would lie upon the declaration as framed; but he reserved to the defendant leave to move to enter a nonsuit if the court should be of opinion that in point of law the action was not maintainable,—the court to have power to draw any inferences of fact, and to amend the declaration if necessary, according to the facts proved.

The case was then left to the jury, who returned a verdict for the plaintiff, damages £50.

Huddleston, Q. C., in Easter term, obtained a *rule nisi*.

Powell, Q. C., and *J. O. Griffiths* (June 11) showed cause, submitting that the action would lie upon the declaration as it stood.

The court called on

H. James and *Jelf*, in support of the rule. There are two kinds of

action for loss of service, viz., an action for the seduction and consequent loss of service of a daughter, and an action for enticing away a servant. In order to sustain the first, it is not enough that there has been criminal intercourse, but it must be shown that that intercourse has resulted in pregnancy or other illness so as to cause a disability in the daughter to perform her accustomed duties: *Eager v. Grimwood*; *Boyle v. Brandon*; ¹ but an actual contract of service need not be proved. It is not suggested that there is any such cause of action here. In *Sedgwick on Damages* (2d ed.), page 548, it is said that "although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover. In other words, without some damage to the plaintiff or master occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief." And for this *Eager v. Grimwood* is cited.

[BOVILL, C. J. *Eager v. Grimwood* is cited in *Smith's Leading Cases* (6th ed.), vol. i. p. 260, with evident disapprobation.]

No precedent is to be found without the allegation *per quod servitium amisit*. The action for seduction is an anomalous one.

[WILLES, J. Upon the first point, I think we are bound by the case of *Eager v. Grimwood*. The question is, whether the action may not be maintained for enticing the girl away from her father's service.]

To sustain an action for enticing away a servant, it is necessary to show a valid and binding contract of service, which has been broken through the procurement of the defendant. Actual service is not enough. Here, there was no contract, express or implied, for the breach of which the father could have sued his daughter. All that the defendant can be charged with having done is, inciting the daughter to do that which in the exercise of her own free will she had an undoubted right to do. If an action would lie for this, it would equally lie for inducing a daughter to quit her father's house for the purpose of marrying her.² See *Fitz. N. B.* 90 H. In *Cox v. Muncey*,³ it was held by this court that no action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship; and the like was held as to a servant by the Court of Queen's Bench in *Sykes v. Dixon*.⁴

[BOVILL, C. J. At the end of Lord Denman's judgment, in *Sykes v. Dixon*, there is a remark which seems to be adverse to your view. "Then," says his Lordship, "it was argued, on the authority of *Keane v. Boycott*,⁵ that the objection" (that is, to the validity of the contract)

¹ 13 M. & W. 738.

² The father can maintain no action in such a case: *Goodwin v. Thompson*, 2 Greene, 829; *Jones v. Tevis*, 4 Litt. 25; *Harvey v. Moseley*, 7 Gray, 479; *Beard v. Holland*, 59 Miss. 161, 164; *Wilkinson v. Dellinger*, 126 N. Ca. 462. Unless the daughter was induced to marry the defendant by the latter's fraud. *Mills v. Hobert*, 2 Root, 48; *Goodwin v. Thompson*, *supra*. — Ed.

³ 6 C. B. x. s. 375.

⁴ 9 Ad. & E. 696; 1 P. & D. 463.

⁵ 2 H. Bl. 511.

"was not one which a third person could take: and that might be so in a case where the servant was *de facto* continuing in the service; but not here, where he had quitted his master, and taken his chance in hiring himself to the defendant." Here the daughter was *de facto* continuing in the service of her father when the defendant seduced her therefrom.]

All the authorities were referred to in *Lumley v. Gye*, and amongst them *Blake v. Lanyon*; but in none of them was the action held to lie in the absence of a binding contract of service.¹

BOVILL, C. J. The rule in this case was granted principally on the contention of the defendant's counsel that, in order to sustain the action, it was necessary to show that there was a binding contract of service between the father and the daughter. And for this proposition various text-books were referred to, and several cases cited, amongst which was that of *Sykes v. Dixon*.² But, when that case is looked at, I find no such principle involved in the decision. Indeed, in each of the cases, from the form of the declaration, it became necessary to prove some contract for service beyond that which the law would imply from the relation of the parties. No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to show the contrary. It is said that the case of seduction is anomalous in this respect. There is, however, no foundation for that assertion. In the case of an action for the seduction of a daughter, no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family. So, in the case of an action for assaulting the plaintiff's infant son or daughter, no evidence of service is necessary beyond that which the law will imply as between parent and child. In *Barber v. Dennis*,³ the widow of a waterman, who, as was said, by the usage of Waterman's Hall, may take an apprentice, had her apprentice taken from her and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover. It was agreed that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master; but it was objected that the company of watermen is a voluntary society, and that being free of it does not make a man free of London, so that the custom of London for persons under one and twenty to bind themselves apprentices does not extend to watermen; which was agreed by all. Then it was said that the supposed apprentice here was no legal apprentice, if the indentures be not enrolled pursuant to the 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title. But Holt, C. J., said he would understand him an apprentice or servant *de facto*, and that would suffice against them, being wrong-doers. Again, in *Fitz. N. B. 91 G.* it is

¹ A part of the argument and the concurring opinion of MONTAGUE SMITH, J., with which KEATINGE, J., agreed, are omitted.—ED.

² 9 Ad. & E. 693; 1 P. & D. 463.

³ 6 Mod 69; 1 Salk. 63.

laid down that, "if a man ought to have toll in a fair, &c., and his servants are disturbed in gathering the same, he shall have trespass for assault of his servants, and for the loss of their service," &c. To this is appended a note by Lord Hale: "Trespass for beating his servants, *per quod servitium amisit*, lies, although he was not retained, but served only at will. 11 Hen. IV. fol. 2, *per* Hull, accordant. And so if A retains B to be his servant, who departs into another county and serves C, A, before any request or seizure, cannot beat B; and, if he does, C shall have trespass against him (21 Hen. VI. fol. 9), and recover damages, having regard to the loss of service (22 Ass. 76): and the retainer is traversable. 11 Hen. VI. fol. 30." These authorities, and the principle upon which the action for assaulting a servant is founded, would seem to show that an actual binding contract is not necessary. There is no allegation in this declaration of a hiring for any definite time. All that is alleged is, that the girl was the daughter and servant of the plaintiff. It cannot be doubted that the jury would infer from the facts that the relation of master and servant did exist, without any evidence of a contract for a definite time; and, if we are to draw inferences from the facts, I should come to the same conclusion. Then, was that relation put an end to? The service, no doubt, was one which would be determinable at the will of either party, as is said by Bramwell, B., in *Thompson v. Ross*.¹ That this kind of service is sufficient, I should gather from the language used by this court in *Hartley v. Cummings*,² and particularly from the judgment of Maule, J. That was an action for seducing workmen from the service of the plaintiff, a glass and alkali manufacturer, and harboring them after notice. It appeared that one Pike was in the service of the plaintiff, and the defendant induced him to leave. In giving judgment, Maule, J., says: "The objection urged on the part of the defendant is, that the agreement entered into by Pike with the plaintiff was one that gave the latter no right to compel Pike to serve him, inasmuch as it was void either for want of mutuality or because it was a contract to an unreasonable extent operating in restraint of trade. On the other side, it was insisted, upon the authority of *Keane v. Boycott*,³ that it is quite immaterial, for the purpose of this action, whether the agreement was void or not; for that it is not competent to the defendants, who are wrong-doers, to take advantage of its invalidity. In answer to this, the case of *Sykes v. Dixon*⁴ was cited on the part of the defendants, where it is said to have been decided by the Court of Queen's Bench that such an objection may be set up by a third person not a party to the agreement. It is unnecessary to say whether that case may not be distinguished from the present, — there being no subsisting service that was interrupted by the act of the defendant, — because I am of opinion that in this case there was a contract between Hartley and Pike, which was perfectly valid, notwithstanding the objections that have been urged." Whether or not there was a subsisting service

¹ 5 H. & N. 16.² 5 C. B. 247.³ 2 H. Bl. 511.⁴ 9 Ad. & E. 693; 1 P. & D. 463.

seems to be the test. I think the jury properly assumed that there was a subsisting service here. It is said that the girl's services were not lost to the plaintiff by reason of the defendant's having enticed her away; for that, inasmuch as she afterwards returned to her father's house, the relation of master and servant was not put an end to by any act of the defendant's. I think, however, there was a sufficient interruption of the service to entitle the plaintiff to maintain the action, and that the rule to enter a nonsuit should be discharged.

WILLES, J. I am of the same opinion. I cannot look at it as an anomaly to hold that the daughter was the servant of her father at the time the defendant by his enticement induced her to forbear from rendering to her father the services which were due to him from her. There is a series of cases in the books, of which that in the Year-Book of 11 Hen. IV. fol. 2, is probably the first, to show that this action is maintainable. This case was followed by a very remarkable one of M. 22 Hen. VI. fol. 30, in which that doctrine is fully recognized, and where service at will and service upon a retainer are put upon the same footing with regard to any complaint of being wrongfully deprived of their fruits, and it is pointed out that the writ at common law ran, "*quare un tiel servientem meum in servitio meo existentem cepit et abduxit*," without alleging any contract or retainer. That runs so completely with the earlier case, and also with the doctrine of Lord Denman in *Sykes v. Dixon*,¹ and of Maule, J., in *Hartley v. Cummings*,² and also with the observations of Bramwell, B., in *Thompson v. Ross*, that I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether *de son bon gre* or *sur retainer*, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost. As a question of fact, was the daughter in the service of her father at the time the cause of action arose? Was the relation of master and servant put an end to by her quitting her father's house by means of the false pretence to which the defendant induced her to resort? There was no proof that she quitted without any intention to return to her home. What pretence, then, was there for assuming that the service at will was put an end to? To use the language of Newton, J., in the case of 22 Hen. VI. fol. 30, it is no more than if a servant should absent herself for the purpose of going to church on the Sabbath day. Then, was the defendant guilty of any wrong in keeping her away from the plaintiff's service? I apprehend that, where the relation of master and servant exists, any fraud whereby the servant is induced to absent herself affords a ground of action. Somewhat the same sort of question arose in *Winsmore v. Greenbank*, where, in an action on the case for inducing the plaintiff's wife to con-

¹ 9 Ad. & E. 693, 699; 1 P. & D. 463.

² 5 C. B. 247.

tinue absent, it was held to be sufficient to state that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion, &c., she did continue absent, &c., whereby the plaintiff lost the comfort and society of his wife," &c., without setting forth the means used by the defendant, or alleging that any adultery had been committed. There is really no difficulty when once the relation of master and servant at the time of the acts complained of is established. It was said that, inasmuch as none of the usual consequences, such as sickness or the birth of a child, resulted from the defendant's acts, no action is maintainable for the mere improper intercourse. Be it so, as there is an authority in favor of that position; but that only removes the charge of debauching the plaintiff's daughter out of the way. It does seem to me to be an extraordinary thing, and to reduce the argument to an absurdity, to say that the plaintiff would have had a sufficient cause of action against the defendant if the daughter had proved with child by him, and had gone back to her father's house and been confined there, and that the fact of the father having through his fraud been deprived of his daughter's services during the nine days' concubinage affords no ground of action. The conclusion I arrive at is, that it was a question for the jury whether at the time the daughter left her father's house there was an existing service *de facto*, and whether by the defendant's means and procurement that service was denied to the plaintiff. If both those questions were found against the defendant, the plaintiff was clearly entitled to the verdict. I think there was abundant evidence to support the finding, and that the rule must be discharged.

*Rule discharged.*¹

¹ Whether it is an excess of fair competition to induce a servant at will to leave the plaintiff, and enter the service of the defendant, cannot be said to be definitely settled. In *Salter v. Howard*, 43 Ga. 601, the plaintiff prevailed; but in *Campbell v. Cooper*, 34 N. H. 49, the defendant was successful. The other cases commonly cited for the plaintiff are distinguishable. In *Sykes v. Dixon*, 9 A. & E. 693, and *Peters v. Lord*, 18 Conn. 337, the servant had left the plaintiff of his own head before entering the service of the defendant. In *Keane v. Boycott*, 2 H. Bl. 511, the defendant, a recruiting officer, officiously induced the servant to leave the plaintiff, in order to enlist as a soldier. In *Speight v. Oliveira*, 2 Stark. 493; *Morgan v. Molony*, 7 Ir. L. R. N. S. 101, 240; *Ball v. Bruce*, 21 Ill. 161; and *Noice v. Brown*, 39 N. J. 569, as in the principal case, the enticement was for an immoral purpose. In *Cox v. Muncey*, 6 C. B. N. S. 375, a father induced an apprentice at will to leave the master, but the motive of the father does not appear.

[*Keane v. Boycott*, 2 H. Bl. 511, "seems contrary to principle and may be taken to be overruled by the decision of the Court of Appeals in *DeFrancesco v. Barnum*, L. R. 45 Chan. Div. 430. The defendant there had enticed away an apprentice of the plaintiff. But the indenture contained unreasonable stipulations, and it was held that it might be avoided by the apprentice, and that it was not unlawful for the defendant to persuade the apprentice to do that which was lawful. It is different, however, if force or fraud be used to take or decoy the servant away. In that case the master has a right of action, even though the servant be under no binding obligation. Per WILLKS, J., *Evans v. Walters*, L. R. 2 Com. Pl., pp. 631-632." Clerk and Lindsell on Torts, 2d ed., 185.]

To induce a servant who is under contract with the plaintiff to leave the latter at the expiration of the term of service, and to enter the defendant's service, is no more than lawful competition. *Nichol v. Martyn*, 2 Esp. 732; *Boston Manufactory v. Binney*, 4 Pick. 425. — ED.

SECTION II. (*continued*).

(c) BY FORCE OR THREATS, OR OFFER OF TEMPORAL GAIN OR THREAT OF TEMPORAL LOSS.

GARRET v. TAYLOR.

IN THE KING'S BENCH, EASTER TERM, 1620.

[Reported in *Croke, James*, 567.]

ACTION on the case. Whereas he was a Freemason, and used to sell stones, and to make stone buildings, and was possessed of a lease for divers years to come of a stone-pit in Hedington, in the county of Oxford, and digged divers stones there, as well to sell as to build withal; that the defendant, to discredit and to deprive him of the commodity of the said mine, imposed so many and so great threats upon his workmen, and all comers disturbed, threatening to mayhem and vex them with suits if they bought any stones; whereupon they all desisted from buying, and the others from working, &c.

After judgment by *nihil dicit* for the plaintiff, and damages found by inquisition to fifteen pounds, it was moved in arrest of judgment, that this action lay not; for nothing is alleged but only words, and no act nor insult: and causeless suits on fear are no cause of action.

Sed non allocatur: for the threatening to mayhem, and suits, whereby they durst not work or buy, is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action: and although it be not shown how he was possessed for years, by what title, &c., yet that being but a conveyance to this action, was held to be well enough. And adjudged for the plaintiff.¹

KEEBLE v. HICKERINGILL.²

IN THE QUEEN'S BENCH, TRINITY TERM, 1706.

[Reported in 11 *East*, 574, note.]

ACTION upon the case. Plaintiff declares that he was, 8th November in the second year of the Queen, lawfully possessed of a close of land called Minott's Meadow, *et de quodam vivario, vocato* a decoy pond, to which divers wild fowl used to resort and come: and the plaintiff had at his own costs and charges prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them: the defendant know-

¹ Dixon v. Dixon, 38 L. An. 1261 *Accord.* — Ed.² This case, though not within the letter, seems to be within the spirit of the title of this chapter. — Ed.

ing which, and *intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl used to resort thither, and deprive him of his profit*, did, on the 8th of November, resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond: and on the 11th and 12th days of November the defendant, *with design to damnify the plaintiff, and fright away the wild fowl*, did place himself with a gun near the vivary, and there did discharge the said gun several times that was then charged with the gunpowder against the said decoy pond, whereby the wild fowl were frightened away, and did forsake the said pond. Upon not guilty pleaded, a verdict was found for the plaintiff and £20 damages.

HOLT, C. J. I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, first, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. To learn the trade of seducing other ducks to come there in order to be taken is not prohibited either by the law of the land or the moral law; but it is as lawful to use art to seduce them, to catch them, and destroy them for the use of mankind, as to kill and destroy wild fowl or tame cattle. Then when a man useth his art or his skill to take them, to sell and dispose of for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not affect any damage, yet are they mischievous in themselves; and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him; though they do not charge him with any crime that may make him obnoxious to punishment; as to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, 1; all the cases there put. How much more, when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. Now there are two sorts of acts for doing damage to a man's employment, for which an action lies; the one is in respect of a man's privilege; the other is in respect of his property. In that of a man's franchise or privilege whereby he hath a fair, market, or ferry, if another shall use the like liberty, though out of his limits, he shall be liable to an action; though by grant from the King. But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. 22 H. 6. 14, 15. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in

all cases. But if a man doth him damage by using the same employment; as if Mr. Hickingill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to his new. (The action there was held not to lie.) But suppose Mr. Hickingill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars. 29 E. 3, 18. A man hath a market, to which he hath toll for horses sold: a man is bringing his horse to market to sell: a stranger hinders and obstructs him from going thither to the market: an action lies, because it imports damage. Action upon the case lies against one that shall by threats fright away his tenants at will. 9 H. 7, 8; 21 H. 6, 31; 9 H. 7, 7; 14 Ed. 4, 7; Vide Rastal. 662; 2 Cro. 423. Trespass was brought for beating his servant, whereby he was hindered from taking his toll; the obstruction is a damage, though not the loss of his service.¹

IBOTTSON v. PEAT.²

IN THE EXCHEQUER, MAY 1, 1865.

[Reported in 3 Hurlstone & Colman, 644.]

BRAMWELL, B.³ I am also of opinion that the plaintiff is entitled to judgment. The declaration states that the plaintiff being possessed of certain land, the defendant unlawfully and with intent to drive and frighten away game then being on the land of the plaintiff, and to prevent him from shooting them, fired rockets and combustibles close to and over the land of the plaintiff, so as to be a nuisance to him. The defendant by his plea admits that the matter alleged is true, but sets up a right to do what is complained of for the purpose attributed to the defendant in the declaration, viz., to prevent him from shooting the game. Then what is the reason given? It is this:—"The game which I frightened was game which you enticed away from the Duke of Rutland's land, by placing corn and other food for them on your land; and therefore I, as the servant of the Duke, in order to prevent you from shooting the game, and from continuing to entice them, did the acts complained of." In my opinion that is a bad plea. There is nothing in point of law to prevent the plaintiff from doing that which

¹ The rest of the opinion is omitted. This case was followed in *Carrington v. Taylor*, 11 East, 571. — Ed.

² See note to preceding case. — Ed.

³ Only the opinion of BRAMWELL, B., is given. POLLOCK, C. B., MARTIN and PIGOTT, BB., concurred. — Ed.

the plea alleges he has done. I say "in point of law," because it cannot be contended for a moment that any action would lie against the plaintiff. As to the propriety of such conduct between gentlemen and neighbors I say nothing. Where a person's game is attracted from his land, he ought to offer them stronger inducements to return to it. It is like the case I referred to in the course of the argument, *Chasemore v. Richards*,¹ which shows that if a man has the misfortune to lose his spring by his neighbor digging a well, he must dig his own well deeper.

Judgment for the plaintiff.

TARLETON AND OTHERS v. M'GAWLEY.

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 21, 1804.

[*Reported in Peake, 205.*]

THIS was a special action on the case. The declaration stated that the plaintiffs had sent a vessel called the "Bannister," with a crew on board, under the command of one Thomas Smith, and loaded with goods proper for trading with the natives, to a part of the coast of Africa called Cameroon, to trade with the natives there. That while the last-mentioned ship was lying off Cameroon, a canoe with some natives on board came to the same for the purpose of establishing a trade, and went back to the shore, of which defendant had notice. And that he well knowing the premises, but *contriving and maliciously intending to hinder and deter the natives from trading* with the said Thomas Smith, for the benefit of the plaintiffs, with force and arms, fired from a certain ship called the "Othello," of which he was master and commander, a certain cannon loaded with gunpowder and shot, at the said canoe, and killed one of the natives on board the same. *Whereby the natives of the said coast were deterred and hindered from trading with the said T. Smith for the benefit, &c., and plaintiffs lost their trade.*

LORD KENYON. This action is brought by the plaintiffs to recover a satisfaction for a civil injury which they have sustained. The injury complained of is, that by the improper conduct of the defendant the natives were prevented from trading with the plaintiffs. The whole of the case is stated on the record, and if the parties desire it, the opinion of the court may hereafter be taken whether it will support an action. I am of opinion it will. Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade, until a debt due from the natives to himself was satisfied. If there was any court in that country to which he could have applied for justice he might have done so, but he had no right to take the law into his own hands.²

¹ 2 H. & N. 168; 7 H. L. 349.

² [St. Johnsbury Co. v. Hunt, 55 Vt. 570 (arrest of plaintiff's engineer on a malicious and baseless charge, whereby the running of plaintiff's train was delayed) *Accord.* — Ed.]

JERSEY CITY PRINTING CO. v. CASSIDY ET ALs.

1902. 63 *New Jersey Equity*, 759.

ON motion, on order to show cause, for an injunction to restrain defendants, former employes of the complainant, and now on strike, from unlawful interference with the complainant's business, the employment of workmen, &c. Heard on bill, answer and affidavits.

Upon filing the bill an order was made restraining the defendants

"from in any manner knowingly and intentionally causing or attempting to cause by threats, offers of money, payment of money, offering to pay or the payment of transportation expenses, inducements or persuasions to any employe of the complainant under contract to render service to it to break such contract by quitting such service; from any and all personal molestation of persons willing to be employed by complainant with intent to coerce such persons to refrain from entering such employment; from addressing persons willing to be employed by complainant against their will and thereby causing them personal annoyance with a view to persuade them to refrain from such employment; from loitering or picketing in the streets near the premises of complainant, Nos. 68 and 70 York street, and No. 37 Montgomery street, Jersey City, with intent to procure the personal molestation and annoyance of persons employed or willing to be employed by complainant and with a view to cause persons so employed to quit their employment, or persons willing to be employed by complainant to refrain from such employment; from entering the premises of complainant, Nos. 68 and 70 York street, Jersey City, against its will with intent to interfere with its business; from violence, threats of violence, insults, indecent talk, abusive epithets practiced upon any persons without their consent with intent to coerce them to refrain from entering the employment of complainant, or to leave its employment."

Mr. George G. Tennant, for the complainant.

Mr. John J. Fallon, for the defendants.

STEVENSON, V. C. (orally). The bill is filed to restrain a body of workmen, who are on a strike, and other persons associated with them, from doing certain things which are alleged to be injurious to the complainant, their former employer. The things that they are restrained from doing are specified in the restraining order. That order was not made hastily. It was formulated with care on the part of the court, and I do not understand that counsel for the defendant criticises its terms on the ground that they are too broad. The defence is that the persons who are enjoined have not been doing, and are not threatening now to do, any of those things that are interdicted. That is the sum and substance of the defence, which has been presented by a great many affidavits and with very great force.

The order does not interfere with the right of the workman to cease his employment for any reasons that he deems sufficient. It does not undertake to say that workmen may not refuse to be employed if certain other classes of workmen are retained in employment. It leaves the workman absolutely free to abstain from work — for good reasons, for bad reasons, for no reasons. His absolute freedom to work, or not to work, is not in any way impaired. The restraining order is based upon the theory that the right of the workman to cease his employment, to refuse to be employed, and to do that in conjunction with

his fellow-workmen, is just as absolute as is the right of the employer to refuse further to employ one man, or ten men, or twenty men who have theretofore been in his employment. From an examination of the cases and a very careful consideration of the subject I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom on the part of the employer to employ whom he will, and to cease to employ whom he will; and the corresponding freedom on the part of the workman, for any reason or no reason, to say that he will no longer be employed; and the further right of the workmen, of their own free will, to combine and meet as one party, as a unit, the employer who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes or intentions of the employer in exercising his absolute right to employ or not to employ as he sees fit, or of the free combination of employes in exercising the corresponding absolute right to be employed or not as they see fit, seems to me to be in the air.

Thus, there is a wide field in which employes may combine and exercise the arbitrary right of "dictating" to their common employer "how he shall conduct his business." The exact correlative of this right of the employe exists, in an equal degree, in the employer. He may arbitrarily "dictate" to five thousand men in his employ in regard to matters in respect of which their conduct ought, according to correct social and ethical principles, to be left entirely free. But if the "dictation" is backed up solely by the announcement that, if it is not submitted to, the dictating party will refrain from employing, or refrain from being employed, as the case may be, no legal or equitable right belonging to the party dictated to, which I am able to discern, is thereby invaded.

Some of the expressions which I have used, and which are commonly used, in relation to this subject seem to me to be misleading. Union workmen who inform their employer that they will strike if he refuses to discharge all non-union workmen in his employ are acting within their absolute right, and, in fact, are merely dictating the terms upon which they will be employed. All such terms necessarily relate both to "how the employer shall conduct his business" and how the employes shall conduct their business.

The doctrine of the old cases, of which we have in New Jersey an interesting example in *State v. Donaldson*, 3 Vr. 151, which placed the employe, when acting in combination with his fellow-workmen, at a tremendous disadvantage as compared with his employer, I think may be regarded as entirely exploded. The authority of the deliverances of the supreme court in *State v. Donaldson* was largely, if not entirely, abolished by statute in 1883.

The principles which I have endeavored to state are all recognized in the restraining order in this case, and are so plainly recognized that the intelligent and industrious counsel for the defendants is unable to point out any respect wherein the terms of the order should be mod-

ified. The things which the restraining order interdicts are things which, for the purposes of this argument, it is practically conceded the defendants have no right to do.

In this situation of the case it would seem to be unnecessary to further consider the legal propriety of the restraining order, much less to take it up clause by clause. I have, however, pointed out what conduct on the part of the defendants is excluded from the operation of this order, and I think that it is fair to all the parties to this suit who are concerned in the maintenance of the restraining order to explain, at least in a general way, what conduct is included within its prohibition. This can be most conveniently done by making plain the most important principles embodied in the order — principles which practically have been developed by the courts of this country and England during the last five or ten years.

The injunction in strike and boycott cases is of very recent use. Already a wide difference of opinion has been developed among judges in regard to the liability of a combination of workmen to actions at law for damages and suits in equity for an injunction.

It is only very recently, I think, that one of the most important rights which now are vindicated by the injunction in a strike case has been differentiated; in many cases it has been apparently half recognized or indirectly enforced.

That the interest of an employer or an employe in a contract for services is property is conceded. Where defendants, in combination or individually, undertake to interfere with and disrupt existing contract relations between the employer and the employe, it is plain that a property right is directly invaded. The effect is the same whether the means employed to cause the workman to break his contract, and thus injure the employer, are violence or threats of violence against the employe or mere molestation, annoyance, or persuasions. In all these cases, whatever the means may be, they constitute the cause of the breaking of a contract, and consequently they constitute the natural and proximate cause of damage. The intentional doing of anything by a third party which is the natural and proximate cause of the disruption of a contract relation, to the injury of one of the contracting parties, is now very generally recognized as actionable, in the absence of a sufficient justification, and the question, in every case, seems to turn upon justification alone.

Where the tangible property of an employer is seized or directly injured by violence, with intent to interfere with the carrying on of his business, the case, also, is free from embarrassment.

In the case of *Frank v. Herold*, 18 Dick. Ch. Rep. 443, Vice-Chancellor Pitney amply discussed the whole subject of the unlawfulness of molestation and annoyance of employes, with intent and with the effect to induce them to abandon their employment, to the injury of their employer's business.

But the difficult case presents itself when the workmen in combi-

nation undertake to interfere with the freedom of action on the part of other workmen who naturally would seek employment where they (the workmen in combination) desire and intend that no man shall be employed excepting upon their terms.

The difficulty is in perceiving how molestation and annoyance, not of the employes of a complainant, but of persons who are merely looking for work and may become employes of the complainant, can be erected into a legal or equitable grievance on the part of the complainant. But the difficulty is still further increased where the possible employes make no complaint to any court for protection, and the conduct of the molesting party does not afford a basis which the ancient common law recognized as sufficient to support an action of tort on their behalf, such as for an assault and battery or a slander. Abusive language is not necessarily actionable at the common law. If to call a man a "scab" in the street or to follow him back and forth from his home to his place of employment was formerly not actionable on behalf of the victim of this petty annoyance, the problem is to understand how one who is merely the victim's possible employer can complain, either at law or in equity, there being no actual contract for service, but only a potential one, interfered with.

It is easier, I think, to obtain a correct idea of the legal and equitable right which underlies many of the injunctions, which have been granted in these strike cases restraining combinations of workmen from interfering with the natural supply of labor to an employer, by means of molestation and personal annoyance, if we exclude from consideration the conduct of the defendants as a cause of action on behalf of the immediate victims of their molestation — i. e., of the workman or workmen whom the combination are seeking to deter from entering into the employment which is offered to them, and which they, if let alone, would wish to accept. I say this, although I firmly believe that the molested workman, seeking employment and unreasonably interfered with in this effort by a combination, has an action for damages at common law, and, where the molestation is repeated and persistent, has the same right to an injunction, in equity, which, under the same circumstances, is accorded to his contemplated employer.

The underlying right in this particular case under consideration, which seems to be coming into general recognition as the subject of protection by courts of equity, through the instrumentality of an injunction, appears to be the right to enjoy a certain free and natural condition of the labor market, which, in a recent case in the House of Lords, was referred to, in the language of Lord Ellenborough, as a "probable expectancy." This underlying right has otherwise been broadly defined or described as the right which every man has to earn his living, or to pursue his trade or business, without undue interference, and might otherwise be described as the right which every man has, whether employer or employe, of absolute freedom to employ or

to be employed. The peculiar element of this perhaps newly-recognized right is that it is an interest which one man has in the freedom of another. In the case before this court the Jersey City Printing Company claims the right, not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company.

A large part of what is most valuable in modern life seems to depend more or less directly upon "probable expectancies." When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these "probable expectancies" are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing wants of an increasingly complex social order, will discover, define and protect from undue interference more of these "probable expectancies."

In undertaking to ascertain and define the rights and remedies of employers and employes, in respect of their "probable expectancies" in relation to the labor market, it is well not to lose sight altogether of any other analogous rights and remedies which are based upon similar "probable expectancies." It will probably be found in the end, I think, that the natural expectancy of employers in relation to the labor market and the natural expectancy of merchants in respect to the merchandise market must be recognized to the same extent by courts of law and courts of equity and protected by substantially the same rules.

It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market. The valuable thing to merchant and to customer, to employer and to employe, manifestly is freedom on both sides of the market. The merchant, with his fortune invested in goods and with perfect freedom to sell, might be ruined if his customers were deprived of their freedom to buy; the purchaser, a householder, seeking supplies for his family, with money in his pocket and free to buy, might find his liberty of no value and might suffer from lack of food and clothing if the shopmen who deal in these articles were so terrorized by a powerful combination as to be coerced into refusing to sell either food or clothing to him.

It is, however, the right of the employer and employe to a free labor market that is the particular thing under consideration in this case.

A man establishes a large factory where working people reside, taking the risk of his being able to conduct his industry and offer these working people employment which they will be willing to accept. He takes the risk of destructive competition and a large number of other risks, out of which, at any time, may come his financial ruin and the suspension of his manufacturing works. But our law, in its recent development, undertakes to insure to him, not only that

he may employ whom he pleases, but that all who wish to be employed by him may enter into and remain in such employment freely, without threats of harm, without unreasonable molestation and annoyance from the words, actions or other conduct of any other persons *acting in combination*. What is the measure or test by which the conduct of a combination of persons must be judged in order to determine whether or not it is an unlawful interference with freedom of employment in the labor market, and as such injurious to an employer of labor in respect of his "probable expectancies," has not as yet been clearly defined. Perhaps no better definition could be suggested than that which may be framed by conveniently using that important legal fictitious person who has taken such a large part in the development of our law during the last fifty years — the reasonably prudent; reasonably courageous and not unreasonably sensitive man. Precisely this same standard is employed throughout the law of nuisance in determining what degree of annoyance on the part of one's neighbor one must submit to, and what degree of such annoyance is excessive and the subject of an action for damages or a suit for an injunction.

A man may not be liable to an action for slander for calling a workman a "scab" in the street, but if a hundred men combine to have this workman denounced as a "scab" in the street, or followed in the streets to and from his home, so as to attract public attention to him and place him in an annoyingly conspicuous position, such conduct, the result of such combination, is held to be an invasion of the "probable expectancy" of his employer or contemplated employer, an invasion of this employer's *right to have labor flow freely to him*. Without any regard to the rights and remedies which the molested workman may have, the injunction goes at the suit of the employer to protect his "probable expectancy" — to secure freedom in the labor market to employ and to be employed, upon which the continuance of his entire industry may depend.

I think it is safe to say that all through this development of strike law, during the last decade, no principle becomes established which does not operate equally upon both employer and employe. The rights of both classes are absolutely equal in respect of all these "probable expectancies." An operator upon printing machines has the right to offer his labor freely to any of the printing shops in Jersey City. These shops may all combine to refuse to employ him on account of his race, or membership in a labor union, or for any other reason, or for no reason, precisely as twenty employes in one printing shop may combine and arbitrarily refuse to be further employed unless the business is conducted in accordance with their views. But in the case of the operative seeking employment, he has a right to have the action of the masters of the printing shops, in reference to employing him, left absolutely free. If, after obtaining, or seeking to obtain, employment in a shop, the master of that shop should be subjected to annoyances and molestation, instigated by the proprie-

tors of other printing shops, who combine to compel, by such molestation and annoyance, this one master printer, against his will and wish, to exclude the operative from employment, this operative, in my judgment, would have a right to an action at law for damages, and would have a right to an injunction if his case presented the other ordinary conditions upon which injunctions issue. But the common law courts have not had time to speak distinctly on this subject as yet, and it is necessary to be cautious in dealing with a subject in which both courts of law and courts of equity as yet are feeling their way.

I think that the leading principle enforced in the restraining order in this case is not inconsistent with any authorities which control this court. This principle is that a combination of employers, or a combination of employes, the object of which is to interfere with the freedom of the employer to employ, or of the employe to be employed (in either of which cases there is an interference with the enjoyment of a "probable expectancy," which the law recognizes as something in the nature of property), by means of such molestation or personal annoyance as would be liable to coerce the person upon whom it was inflicted, assuming that he is reasonably courageous and not unreasonably sensitive, to refrain from employing or being employed, is illegal and founds an action for damages on the part of any person knowingly injured in respect of his "probable expectancy" by such interference, and also, when the other necessary conditions exist, affords the basis of an injunction from a court of equity.

The doctrine which supports that portion of the restraining order in this case which undertakes to interdict the defendants from molesting applicants for employment as an invasion of a right of the complainant, is applicable to a situation presenting either an employer or an employe as complainant, and containing the following elements:

First. Some person or persons desiring to exercise the right of employing labor, or the right of being employed to labor.

Second. A combination of persons to interfere with that right, by molestation or annoyance, of the employers who would employ, or of the employes who would be employed, in the absence of such molestation.

How far the element of combination of a number of persons will finally be found necessary, in order to make out the invasion of a legal or equitable right in this class of cases, need not be discussed. We are dealing with cases where powerful combinations of large numbers, in fact, exist.

Third. Such a degree of molestation as might constrain a person having reasonable fortitude, and not being unreasonably sensitive, to abandon his intention to employ or to be employed, in order to escape such molestation.

Fourth. As the result of the foregoing conditions, an actual pecu-

niary loss to the complaining party, by the interference with his enjoyment of his "probable expectancies" in respect of the labor market.

I do not think that the constraining force brought to bear upon the employer or employe which the law can interdict can ever include the power of public opinion or even of class opinion. Every man, whether an employer or an employe, constitutes a part of a great industrial system, and his conduct is open to the criticism of the members of his own class. While, therefore, a combination of union men have no right to cry "scab" in the streets to non-union employes, or follow them in the street in a body to and from their homes, or do many other things *in combination*, which, if done once by a single individual, would not found an action of tort, such combinations, I think, have left a fairly wide field of effort towards the creation and application of public opinion as a constraining force upon conduct of any kind which they wish to discourage.

I have endeavored to explain, in a general way, my own view of the most important and least understood principle embodied in the restraining order in this case, in order that the defendants, and, in fact, all parties interested, may have all possible light in construing and applying the exact terms of the order. What I have said may be found to be subject to modifications, without subjecting the terms of the order to any change. All generalizations on such a subject — such a novel subject as the one under consideration — are dangerous. There may be conduct on the part of a combination of employers, or of employes, which would seem to come within the general definition or description of illegal and prohibited conduct, which I have attempted to frame, but which conduct, nevertheless, might be justified, and hence could not be adjudged illegal. Molestation and personal annoyance, however, the terms which I have employed, do not seem to be inclusive of any justifiable conduct, especially if no one is allowed to complain that he is molested or annoyed by being subjected peaceably to the judgment and criticism of public opinion.

The vice-chancellor then discussed at length the effect of the answer of the defendants and the affidavits annexed thereto, which denied all the charges of interference with existing labor contracts or molestation practiced to prevent new workmen from being employed. The conclusion was that, notwithstanding such denials, even when sustained by the greater weight of evidence, the restraining order should be held in force as to those defendants who stood fairly charged, under oath, with the interdicted misconduct, and should be vacated as to any other defendants not so charged; that the sole issue appeared to be one of fact, viz., whether the defendants had done, and were threatening to do, the acts complained of or not, and that such an issue could not properly be tried on *ex parte* affidavits, but should be reserved for the final hearing; that in a case like this, where the

defendants were the only persons in sight apparently interested in having the unlawful conduct complained of continued, and were therefore subjected to a temptation to cause such conduct to be continued, an injunction which merely prevented them from doing acts which they disclaimed any right to do, and denied that they had done or threatened to do, should be retained until the final hearing.

P. P. SHERRY AND OTHERS v. C. E. PERKINS AND ANOTHER.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 19, 1888.

[Reported in 147 Massachusetts Reports, 212.]

W. ALLEN, J.¹ The case finds that the defendants entered, with others, into a scheme, by threats and intimidation, to prevent persons in the employment of the plaintiffs from continuing in such employment, and to prevent others from entering into such employment; that the banners with their inscriptions were used by the defendants as part of the scheme; and that the plaintiffs were thereby injured in their business and property.

The act of displaying banners with devices, as a means of threats and intimidation to prevent persons from entering into or continuing in the employment of the plaintiffs, was injurious to the plaintiffs, and illegal at common law and by statute.² *Walker v. Cronin*. We think that the plaintiffs are not restricted to their remedy by an action at law, but are entitled to relief by injunction. The acts and the injury were continuous. The banners were used more than three months before the filing of the plaintiffs' bill, and continued to be used at the time of the hearing. The injury was to the plaintiffs' business, and adequate remedy could not be given by damages in a suit at law.

The wrong is not, as argued by the defendants' counsel, a libel upon the plaintiffs' business. It is not found that the inscriptions upon the banners were false, nor do they appear to have been in disparagement of the plaintiffs' business. The scheme in pursuance of which the banners were displayed and maintained was to injure the plaintiffs' business, not by defaming it to the public, but by intimidating workmen, so as to deter them from keeping or making engagements with the plaintiffs. The banner was a standing menace to all who were or wished to be in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises. Maintaining it was a continuous unlawful act, injurious to the plaintiffs' business and property, and was a nuisance such as a court of equity will grant relief against. *Gilbert v. Mickle*;³ *Springhead Spinning Co. v. Riley*.⁴

¹ Only the opinion of the court is given. — ED.

² Pub. Sts. c. 74, § 2.

³ 4 Sandf. Ch. 357.

⁴ L. R. 6 Eq. 551.

Boston Diatite Co. v. Florence Manuf. Co.¹ was a case of defamation only. Some of the language in Springhead Spinning Co. v. Riley has been criticised, but the decision has not been overruled. See Boston Diatite Co. v. Florence Manuf. Co., *ubi supra*; Prudential Assurance Co. v. Knott;² Saxby v. Easterbrook;³ Thorley's Cattle Food Co. v. Massam;⁴ Thomas v. Williams;⁵ Day v. Brownrigg;⁶ Gaskin v. Balls;⁷ Hill v. Davies;⁸ Hermann Loog v. Bean.⁹

Decree for the plaintiffs.

VEGELAHN v. GUNTNER.

1896. 167 Massachusetts, 92.¹⁰

BILL IN EQUITY against fourteen individual defendants and two trades unions.

The following decree was entered at a preliminary hearing upon the bill: "This cause came on to be heard upon the plaintiff's motion for a temporary injunction; and after due hearing, at which the several defendants were represented by counsel, it is ordered, adjudged, and decreed that an injunction issue *pendente lite*, to remain in force until the further order of this court, or of some justice thereof, restraining the respondents and each and every of them, their agents and servants, from interfering with the plaintiff's business by patrolling the sidewalk or street in front or in the vicinity of the premises occupied by him, for the purpose of preventing any person or persons who now are or may hereafter be in his employment, or desirous of entering the same, from entering it, or continuing in it; or by obstructing or interfering with such persons, or any others, in entering or leaving the plaintiff's said premises; or by intimidating, by threats or otherwise, any person or persons who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or continuing in it; or by any scheme or conspiracy among themselves or with others, organized for the purpose of annoying, hindering, interfering with, or preventing any person or persons who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein."

Hearing upon the bill and answers before Holmes, J., who reported the case for the consideration of the full court, as follows:—

"The facts admitted or proved are that, following upon a strike of the plaintiff's workmen, the defendants have conspired to prevent the plaintiff from getting workmen, and thereby to prevent him from

¹ 114 Mass. 69.

² L. R. 10 Ch. 142.

³ 3 C. P. D. 339.

⁴ 14 Ch. D. 763.

⁵ 14 Ch. D. 864.

⁶ 10 Ch. D. 294.

⁷ 13 Ch. D. 324.

⁸ 21 Ch. D. 798.

⁹ 26 Ch. D. 306.

¹⁰ Statement abridged. — Ed.

carrying on his business unless and until he will adopt a schedule of prices which has been exhibited to him, and for the purpose of compelling him to accede to that schedule, but for no other purpose. If he adopts that schedule he will not be interfered with further. The means adopted for preventing the plaintiff from getting workmen are, (1) in the first place, persuasion and social pressure. And these means are sufficient to affect the plaintiff disadvantageously, although it does not appear, if that be material, that they are sufficient to crush him. I ruled that the employment of these means for the said purpose was lawful, and for that reason refused an injunction against the employment of them. If the ruling was wrong, I find that an injunction ought to be granted.

"(2) I find also, that, as a further means for accomplishing the desired end, threats of personal injury or unlawful harm were conveyed to persons seeking employment or employed, although no actual violence was used beyond a technical battery, and although the threats were a good deal disguised, and express words were avoided. It appeared to me that there was danger of similar acts in the future. I ruled that conduct of this kind should be enjoined.

"The defendants established a patrol of two men in front of the plaintiff's factory, as one of the instrumentalities of their plan. The patrol was changed every hour, and continued from half-past six in the morning until half-past five in the afternoon, on one of the busy streets of Boston. The number of men was greater at times, and at times showed some little inclination to stop the plaintiff's door, which was not serious, but seemed to me proper to be enjoined. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen, and conduct of that sort is covered by (2) above, but its main purpose was in aid of the plan held lawful in (1) above. I was satisfied that there was probability of the patrol being continued if not enjoined. I ruled that the patrol, so far as it confined itself to persuasion and giving notice of the strike, was not unlawful, and limited the injunction accordingly.

"There was some evidence of persuasion to break existing contracts. I ruled that this was unlawful, and should be enjoined.

"I made the final decree appended hereto. If, on the foregoing facts, it ought to be reversed or modified, such decree is to be entered as the full court may think proper; otherwise, the decree is to stand."

The final decree was as follows "This cause came on to be heard, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that the defendants, and each and every of them, their agents and servants, be restrained and enjoined from interfering with the plaintiff's business by obstructing or physically interfering with any persons in entering or leaving the plaintiff's premises numbered 141, 143, 145, 147 North Street in said Boston, or by intimidating, by threats, express or implied, of violence

or physical harm to body or property, any person or persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same, from entering or continuing in it, or by in any way hindering, interfering with, or preventing any person or persons who now are in the employment of the plaintiff from continuing therein, so long as they may be bound so to do by lawful contract."

The case was argued at the bar in March, 1896, and afterwards was submitted on briefs to all the judges.

. *T. H. Russell*, for the defendants.

E. B. Hale, for the plaintiff.

ALLEN, J. The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen, and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half-past six in the morning till half-past five in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop the plaintiff's door. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued, if not enjoined. There was also some evidence of persuasion to break existing contracts.

The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. *Commonwealth v. Perry*, 155 Mass. 117; *People v. Gillson*, 109 N. Y. 389; *Braceville Coal Co. v. People*, 147 Ill. 66, 71; *Ritchie v. People*, 155 Ill. 98; *Low v. Rees Printing Co.*, 41 Neb. 127. No one can lawfully interfere by force or intimidation to prevent employers or persons employed or wishing to be employed from the exercise of these rights. In Massachusetts, as in some other States, it is even made a criminal offence for one by intimidation or force to

prevent or seek to prevent a person from entering into or continuing in the employment of a person or corporation. Pub. Sts. c. 74, § 2. Intimidation is not limited to threats of violence or of physical injury to person or property. It has a broader signification, and there also may be a moral intimidation which is illegal. Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in *Sherry v. Perkins*, 147 Mass. 212. It was declared to be unlawful in *Regina v. Druitt*, 10 Cox C. C. 592; *Regina v. Hibbert*, 13 Cox C. C. 82; and *Regina v. Bauld*, 13 Cox C. C. 282. It was assumed to be unlawful in *Trollope v. London Building Trades Federation*, 11 T. L. R. 228, though in that case the pickets were withdrawn before the bringing of the bill. The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases, and, when instituted for the purpose of interfering with his business, it became a private nuisance. See *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555; *Barr v. Essex Trades Council*, 8 Dick. 101; *Murdock v. Walker*, 152 Penn. St. 595; *Wick China Co. v. Brown*, 164 Penn. St. 449; *Cœur d'Alene Consolidated & Mining Co. v. Miners' Union*, 51 Fed. Rep. 260; *Temperton v. Russell*, [1893] 1 Q. B. 715; *Flood v. Jackson*, 11 T. L. R. 276; *Wright v. Hennessy*, a case before Baron Pollock, 52 Alb. L. J. 104; *Judge v. Bennett*, 36 W. R. 103; *Lyons v. Wilkins*, [1896] 1 Ch. 811.

The defendants contend that these acts were justifiable, because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. Various decided cases fall within the former class, for example: *Worthington v. Waring*, 157 Mass. 421; *Snow v. Wheeler*, 113 Mass. 179; *Bowen v. Matheson*, 14 Allen, 499; *Commonwealth v. Hunt*, 4 Met. 111; *Heywood v. Tillson*, 75 Maine, 225; *Cote v. Murphy*, 159 Penn. St. 420; *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223; *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; *Curran v. Treleaven*, [1891] 2 Q. B. 545, 561. The present case falls within the latter class.

Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime. *Sherry v. Perkins*, 147

Mass. 212. *In re Debs*, 158 U. S. 564, 593, 599; *Baltimore & Potomac Railroad v. Fifth Baptist Church*, 108 U. S. 317, 329; *Cranford v. Tyrrell*, 128 N. Y. 341, 344; *Gilbert v. Mickle*, 4 Sandf. Ch. 357; *Mobile v. Louisville & Nashville Railroad*, 84 Ala. 115, 126; *Arthur v. Oakes*, 63 Fed. Rep. 310; *Toledo, Ann Arbor, & North Michigan Railway v. Pennsylvania Co.*, 54 Fed. Rep. 730, 744; *Emperor of Austria v. Day*, 3 DeG., F. & J. 217, 239, 240, 253; *Hermann Loog v. Bean*, 26 Ch. D. 306, 314, 316, 317; *Monson v. Tussaud*, [1894] 1 Q. B. 671, 689, 690, 698.

A question is also presented whether the court should enjoin such interference with persons in the employment of the plaintiff who are not bound by contract to remain with him, or with persons who are not under any existing contract, but who are seeking or intending to enter into his employment. A conspiracy to interfere with the plaintiff's business by means of threats and intimidation, and by maintaining a patrol in front of his premises in order to prevent persons from entering his employment, or in order to prevent persons who are in his employment from continuing therein, is unlawful, even though such persons are not bound by contract to enter into or to continue in his employment; and the injunction should not be so limited as to relate only to persons who are bound by existing contracts. *Walker v. Cronin*, 107 Mass. 555, 565; *Carew v. Rutherford*, 106 Mass. 1; *Sherry v. Perkins*, 147 Mass. 212; *Temperton v. Russell*, [1893] 1 Q. B. 715, 728, 731; *Flood v. Jackson*, 11 L. T. R. 276.

In the opinion of a majority of the court the injunction should be in the form originally issued. *So ordered.*

[The opinion of FIELD, C. J., is omitted. His conclusion was, "that the decree entered by Mr. Justice Holmes should be affirmed without modification."]

HOLMES, J. In a case like the present, it seems to me that, whatever the true result may be, it will be of advantage to sound thinking to have the less popular view of the law stated, and therefore, although when I have been unable to bring my brethren to share my convictions my almost invariable practice is to defer to them in silence, I depart from that practice in this case, notwithstanding my unwillingness to do so in support of an already rendered judgment of my own.

In the first place, a word or two should be said as to the meaning of the report. I assume that my brethren construe it as I meant it to be construed, and that, if they were not prepared to do so, they would give an opportunity to the defendants to have it amended in accordance with what I state my meaning to be. There was no proof of any threat or danger of a patrol exceeding two men, and as of course an injunction is not granted except with reference to what there is reason to expect in its absence, the question on that point is whether a patrol of two men should be enjoined. Again, the defendants are enjoined by the final decree from intimidating by threats, express or implied, of physical harm to body or property, any person

who may be desirous of entering into the employment of the plaintiff so far as to prevent him from entering the same. In order to test the correctness of the refusal to go further, it must be assumed that the defendants obey the express prohibition of the decree. If they do not, they fall within the injunction as it now stands, and are liable to summary punishment. The important difference between the preliminary and the final injunction is that the former goes further, and forbids the defendants to interfere with the plaintiff's business "by any scheme . . . organized for the purpose of . . . preventing any person or persons who now are or may hereafter be . . . desirous of entering the [plaintiff's employment] from entering it." I quote only a part, and the part which seems to me most objectionable. This includes refusal of social intercourse, and even organized persuasion or argument, although free from any threat of violence, either express or implied. And this is with reference to persons who have a legal right to contract or not to contract with the plaintiff, as they may see fit. Interference with existing contracts is forbidden by the final decree. I wish to insist a little that the only point of difference which involves a difference of principle between the final decree and the preliminary injunction which it is proposed to restore, is what I have mentioned, in order that it may be seen exactly what we are to discuss. It appears to me that the judgment of the majority turns in part on the assumption that the patrol necessarily carries with it a threat of bodily harm. That assumption I think unwarranted, for the reasons which I have given. Furthermore, it cannot be said, I think, that two men walking together up and down a sidewalk and speaking to those who enter a certain shop do necessarily and always thereby convey a threat of force. I do not think it possible to discriminate, and to say that two workmen, or even two representatives of an organization of workmen, do, — especially when they are, and are known to be, under the injunction of this court not to do so. See Stimson, Handbook to Labor Law, § 60, esp. pp. 290, 298, 299, 300; *Regina v. Shepherd*, 11 Cox C. C. 325. I may add, that I think the more intelligent workingmen believe as fully as I do that they no more can be permitted to usurp the State's prerogative of force than can their opponents in their controversies. But if I am wrong, then the decree as it stands reaches the patrol, since it applies to all threats of force. With this I pass to the real difference between the interlocutory and the final decree.

I agree, whatever may be the law in the case of a single defendant, *Rice v. Albee*, 164 Mass. 88, that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. *Walker v.*

Cronin, 107 Mass. 555; *Morasse v. Brochu*, 151 Mass. 567; *Tasker v. Stanley*, 153 Mass. 148.

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.

To illustrate what I have said in the last paragraph, it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause," as was alleged in *Walker v. Cronin* and *Rice v. Albee*. The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. *Commonwealth v. Hunt*, 4 Met. 111, 134. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them.

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. In such a case it cannot matter whether the plaintiff is the only rival of the defendant, and so is aimed at specifically, or is one of a class all of whom are hit. The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with

the plaintiff, as a means of inducing them not to deal with him either as customers or servants. *Commonwealth v. Hunt*, 4 Met. 111, 132, 133; *Bowen v. Mutheson*, 14 Allen, 499; *Heywood v. Tillson*, 75 Maine, 225; *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25.

I pause here to remark that the word "threats" often is used as if, when it appeared that threats had been made, it appeared that unlawful conduct had begun. But it depends on what you threaten. As a general rule, even if subject to some exceptions, what you may do in a certain event you may threaten to do,¹ that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequences. So as to "compulsion," it depends on how you "compel." *Commonwealth v. Hunt*, 4 Met. 111, 133. So as to "annoyance" or "intimidation." *Connor v. Kent*, *Curran v. Treleaven*, 17 Cox C. C. 354, 367, 368, 370. In *Sherry v. Perkins*, 147 Mass. 212, it was found as a fact that the display of banners which was enjoined was part of a scheme to prevent workmen

¹ [. . . "the defendant associations had the absolute right to threaten to do that which they had the right to do." PARKER, C. J., in *National Protective Association v. Cumming*, 170 New York, 315, p. 329.

"It will be said that a man has the absolute right to threaten to do that which he has a right to do. Granted that what you may absolutely do you may absolutely threaten to do (give unqualified notice of your intention to do). But it does not follow that you may conditionally threaten to do it. The right to absolutely refuse to work and the right to conditionally refuse to do not, as against third persons, i. e., persons other than the employer, stand to each other in the relation of the greater to the less. The former does not necessarily include the latter. They are distinct from each other; and the latter may sometimes be the more important and the more dangerous right of the two." 20 Harv. Law Rev., p. 273.

"The right to quit an employment which is terminable at will may include a right to give absolute and unqualified notice of intention to leave."

"It may also include, as against an employer, a right to annex any possible condition to an offer to work or to a threat to refrain from working. By 'right as against an employer' we mean that an employer could not maintain an action against a laborer for annexing such conditions. The employer is not legally damaged by such an offer. He is not bound to accept it. As between B and C, the person with whom B is directly dealing, it may be true that 'the right to refuse to deal involves the right to name any terms which one pleases, and to refuse to deal except on these terms.' C cannot maintain an action against B for insisting on unreasonable terms. But the terms or conditions annexed to an offer may relate to the offeree's relations to a third person, and [if the offeree accepts and performs the conditions] that may raise a question whether such third person has any ground of complaint."

"We think that the right to work or not to work does not include, as against third persons, the right to annex any possible condition to an offer to work or to a notice of intention to refrain from work. Suppose that B offers to work for C on condition that C commits a battery on A. Could B effectively deny that he instigated the commission of the battery? Could B escape liability to A on the ground that he was merely stating to C the conditions on which he was willing to exercise his right to labor or not to labor?" 20 Harv. Law Rev. 270-271.

The contrary view is open to several objections:—

"1. It assumes that, if certain conduct of B does not violate any legal right of C, it cannot infringe a legal right of A.

"2. It overlooks the distinction between unconditionally exercising a right, and offering to exercise it (or to refrain from exercising it) on condition that the offeree shall take action which is intended to produce (and does produce) damage to a third person.

"3. It assumes that one who intentionally instigates a second person to inflict damage on a third person can escape responsibility by putting the instigation in the form of a conditional offer to exercise, or to refrain from exercising, a right which he had against the second person." 20 Harv. Law Rev. 269. — ED.]

from entering or remaining in the plaintiff's employment, "by threats and intimidation." The context showed that the words as there used meant threats of personal violence, and intimidation by causing fear of it.

I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests.

So far, I suppose, we are agreed. But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and on principle. *Commonwealth v. Hunt*, 4 Met. 111; *Randall v. Hazeltin*, 12 Allen, 412, 414. There was combination of the most flagrant and dominant kind in *Bowen v. Matheson* and in the Mogul Steamship Company's case, and combination was essential to the success achieved. But it is not necessary to cite cases; it is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination, and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think it, or detrimental, it is inevitable, unless the fundamental axioms of society, and even the fundamental conditions of life, are to be changed.

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. I am unable to reconcile *Temperton v. Russell*, [1893] 1 Q. B. 715, and the cases which follow it, with the Mogul Steamship Company case. But *Temperton v. Russell* is not a binding authority here, and therefore I do not think it necessary to discuss it.

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which

they otherwise lawfully control. I can remember when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is wrong, if it is dissociated from any threat of violence, and is made for the sole object of prevailing if possible in a contest with their employer about the rate of wages. The fact, that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist, does not necessarily make it unlawful, any more than when a great house lowers the price of certain goods for the purpose, and with the effect, of driving a smaller antagonist from the business. Indeed, the question seems to me to have been decided as long ago as 1842 by the good sense of Chief Justice Shaw, in *Commonwealth v. Hunt*, 4 Met. 111. I repeat at the end, as I said at the beginning, that this is the point of difference in principle, and the only one, between the interlocutory and the final decree. See *Regina v. Shepherd*, 11 Cox C. C. 325; *Connor v. Kent*, *Gibson v. Lawson*, *Curran v. Treleaven*, 17 Cox C. C. 354.

The general question of the propriety of dealing with this kind of case by injunction I say nothing about, because I understand that the defendants have no objection to the final decree if it goes no further, and that both parties wish a decision upon the matters which I have discussed.

ANONYMOUS.

IN THE COMMON PLEAS, HILARY TERM, 1410.

[Reported in *Year-Book*, 11 *Henry IV.*, folio 47, placitum 21.]

Two masters of a grammar school at Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40*d.* or two shillings a quarter from each child, now they got only 12*d.*, to their damage, &c.

Tillesley. His writ is worthless.

Skrene. It is a good action on the case, and the plaintiffs have shown well enough how they are damaged; wherefore, &c.

HANKFORD, J. There may be *damnum absque injuria*. As if I have a mill, and my neighbor builds another mill, whereby the profit of mine is diminished, I shall have no action against him; ¹ still I am damaged, *quod* THIRNING, C. J., *concessit*, and said that the instruction of children is a spiritual matter; and if one retains a master in his house to teach his children, it is a damage to the common master of the town, yet, I think, he will have no action.

¹ Bract. fol. 221, a; Y. B. 22 Hen. VI., 14, pl. 23 *Accord.* — Ed.

Skrene. The masters of Paul's claim that there shall be no other masters in all London except themselves.

Horton demurred because the action was not maintainable.

HILL, J. There is no ground to maintain this action, since the plaintiffs have no estate, but a ministry for the time; and though another equally competent with the plaintiffs comes to teach the children, this is a virtuous and charitable thing, and an ease to the people, for which he cannot be punished by our law.

Skrene. If a market is erected to the nuisance of my market, I shall have an assize of nuisance; and in a common case, if those coming to my market be disturbed or beaten, whereby I lose my toll, I shall have a good action on my case;¹ so here.

HANKFORD, J. Not the same case, because in the case put you have a freehold and inheritance in the market; but here the plaintiffs have no estate in the schoolmastership, &c., but for an uncertain time, and it would be against reason for a master to be hindered from keeping school where he pleases, unless where a university was incorporated or a school founded in ancient times.

And the opinion of the court was that the writ would not lie. Wherefore it was awarded that they should take nothing, &c.²

THE MOGUL STEAMSHIP CO. LIMITED v. MCGREGOR &
CO. AND OTHERS.

IN THE COURT OF APPEAL, JULY 13, 1889.

[Reported in *Law Reports*, 23 *Queen's Bench Division*, 598.]

*BOWEN, L. J.*³ We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as, for the purposes of the present case, we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of ship-owners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control

¹ Y. B. 14 & 15 Ed. III. (Rolls Series) 96; Y. B. 29 Ed. III. 18, b. *Accord.* — Ed.

² Y. B. 12 Henry VIII. 3-3 *Accord.* — Ed.

³ Only the opinion of *BOWEN, L. J.*, is given. *FRY, L. J.*, concurred, but *LORD ESHER, M. R.*, dissented. The decision was afterwards affirmed in the House of Lords. '92, App. Cas. 25. — Ed.

of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of five per cent to all local shippers and agents who would deal exclusively with vessels belonging to the Conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year — a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows: — First, a circular of May 10, 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled. Secondly, the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight. Thirdly, the offer at Hankow of freights at a level which would not repay a ship-owner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field. Fourthly, pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels, and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal unless made so by the object with which, or the combination in the course of which, they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started — that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn

the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still, therefore, leaves unsolved the question of what, as between the plaintiffs and defendants, are the rights of trade. For the purpose of clearness, I desire, as far as possible, to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever possible.

The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi*, may enter into or affect the conception of a personal wrong; see *Chasemore v. Richards*.¹ All personal wrong means the infringement of some personal right. "It is essential to an action in tort," say the Privy Council in *Rogers v. Rajendro Dutt*,² "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct; and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong (see *Bromage v. Prosser*; *Capital and Counties Bank v. Henty*, *per Lord Blackburn*³). The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But in order to see whether they were wrongful we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely in the mode and manner that best suits them, and which they think best calculated to secure their own advantage.

What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation,

¹ 7 H. L. C. 349, at p. 383.

² 13 Moore, P. C. 209.

³ 7 App. Cas. 741, at p. 772.

obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence, *Tarleton v. M'Gawley*; the obstruction of actors on the stage by preconcerted hissing, *Clifford v. Brandon*,¹ *Gregory v. Brunswick*; the disturbance of wild fowl in decoys by the firing of guns, *Carrington v. Taylor*² and *Keeble v. Hickeringill*; the impeding or threatening servants or workmen, *Garret v. Taylor*; the inducing persons under personal contracts to break their contracts, *Bowen v. Hall*, *Lumley v. Gye*, — all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would but for such a motive be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right *in rem* or *in personam*, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason, for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates provided they did not lower them beyond a "fair freight," whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a "fair freight?" It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the ship-owner. But over what period of time is the

¹ 2 Camp. 358.² 11 East, 571.

average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether ship-owners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, "Thus far shalt thou go, and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can in my opinion be warranted. A man is bound not to use his property so as to infringe upon another's right. *Sic utere tuo ut alienum non ledas*. If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider reasonable: see *Chasemore v. Richards*.¹ If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: see *Skinner v. Gunton*; ² *Hutchins v. Hutchins*.³ But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act, or to do a lawful act by unlawful means: *O'Connell v. The Queen*; ⁴ *Reg. v. Parnell*; ⁵ and the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to do a lawful act by unlawful means? A moment's consideration will be sufficient to

¹ 7 H. L. C. 349.

² 1 Wms. Saund. 229.

³ 7 Hill's New York Cases, 104; Bigelow's Leading Cases on Torts, 207.

⁴ 11 Cl. & F. 155.

⁵ 14 Cox, Criminal Cases, 508.

show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only differentia that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry, except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own, and one individual merchant may lawfully do that which a firm or a partnership may not. What limits, on such a theory, would be imposed by law on the competitive action of a joint-stock company limited, is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause — is evidence — to use a technical expression — of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital, when used for purposes of competition, in the manner proposed by the argument of the plaintiffs, would, in the present day, be impossible — would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought; to buy up by preconcerted action all the provisions in a market or district in times of scarcity: see *Rex v. Waddington*;¹ to combine to purchase all the shares of a

¹ 1 East, 143.

company against a coming settling-day; or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? In cases like these, where the elements of intimidation, molestation, or the other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional, and that it is calculated to do harm to others. Then comes the question, Was it done with or without "just cause or excuse?" If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: see the summing-up of Erle, J., and the judgment of the Queen's Bench in *Reg. v. Rowlands*.¹ But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J., in *Reg. v. Rowlands*,² of workmen and of masters: "The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the defendants' Conference or association illegal, as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade, are not, in my opinion, illegal in any sense, except that the law will not enforce them. It does not prohibit the making of such contracts; it merely declines, after they have been made, to recognize their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Crompton, J., in *Hilton v. Eckersley*,³ is, I think, not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decisions in *Cousins v. Smith*⁴ is not very intelligible, even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his "Lives of the Chancellors." If

¹ 17 Q. B. 671.

² 17 Q. B. 671, at p. 687, n.

³ 6 E. & B. 47.

⁴ 13 Ves. 542.

indeed it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these were always necessarily injurious to the public — a view which involves, perhaps, the disputable assumption that, in a country of free trade, and one which is not under the iron *régime* of statutory monopolies, such confederations can ever be really successful — and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are, to my mind, at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law.

In the result, I agree with Lord Coleridge, C. J., and differ, with regret, from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights," to which commercial adventurers, otherwise innocent, were bound to conform.

In my opinion, accordingly, this appeal ought to be dismissed with costs.

*Appeal dismissed.*¹

DELZ v. WINFREE AND OTHERS.

IN THE SUPREME COURT, TEXAS, MARCH 24, 1891.

[Reported in 80 Texas, 400.]

HENBY, *Associate Justice*.² This suit was brought to recover damages by Bernard Delz against the members of the firm of Winfree, Norman & Pearson, and the members of the firm of Borden & Borden.

Plaintiff's petition stated his cause of action as follows: That he was pursuing the occupation of a butcher in the city of Galveston, and was making and would have continued to make large profits and gains in the business but for the grievances committed by the defendants as

¹ *Payne v. Railroad Co.*, 13 Lea, 507 (Freeman and Turbey, JJ., dissenting). *South Royalton Bank v. Suffolk Bank*, 37 Vt. 506; *Delz v. Winfree*, 80 Tex. 402, 406 (*semble*), *Acord*. — ED.

² Only the opinion of the court is given. — ED.

alleged; that in the prosecution of his business he had opened and was conducting two butcher shops in said city for the sale of different kinds of fresh meat; that it became necessary that he should buy live animals suitable and fit to be slaughtered for the purposes of his business as a butcher, and for a long time before and at the time of the commission by defendants of the grievances herein stated he was engaged in the business of buying live animals suitable and fit to be slaughtered and sold as fresh butcher's meat, and which he slaughtered and sold as such at his said two butcher shops; that the persons from whom plaintiff bought said live animals were engaged in the business of transporting to Galveston and receiving for sale live animals suitable and fit to be slaughtered and sold as butcher's meat, and in selling such live animals for such purposes to whosoever would buy; that long before and at the time of the commission by defendants of the wrongs herein charged the defendants were engaged, and are now engaged, as separate firms in said business of receiving and selling live animals for the purposes aforesaid on Galveston Island, and were and are now the only persons or association of persons so engaged in said business in Galveston County; that without justifiable cause and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent plaintiff from carrying on his said business and making a living thereby, the said Winfree, Norman & Pearson, on or about the 1st day July, 1889, and at divers times thereafter, and until the filing of this petition, did combine, confederate, and conspire with said firm of Borden & Borden, and with one Gerhard Barbour, a butcher, not to sell to petitioner for cash any live animals or slaughtered meat for the purposes or for the prosecution of his said business; that the said Winfree, Norman & Pearson solicited and procured from said Borden & Borden an agreement not to sell any live animals to plaintiff, and did so induce said Gerhard Barbour and others to plaintiff unknown not to sell to him slaughtered meat for the purposes of his said business.

The petition charges that in pursuance of said combination each of said firms subsequently refused to sell plaintiff live animals when he applied to them to purchase them at their own price in money which he then offered to pay them, and that said Gerhard Barbour likewise refused to sell him slaughtered meat; that by reason of such unlawful combination and malicious interference with his business, plaintiff was compelled to close up and discontinue his business in one of his two shops, and in order to continue it at the other one of his shops he has been and is now forced to buy slaughtered meat at a great disadvantage and at higher prices than he would have had to pay but for the aforesaid unlawful combination and malicious interference with and hindrance of his business by defendants.

The court sustained a general demurrer to the petition.

Appellant's assignment of error brings before us the correctness of this ruling.

The appellee contends that at common law "a conspiracy cannot be

made the subject of a civil action, although damages result, unless something is done which without the conspiracy would give a right of action. In other words an act which if done by one alone constitutes no ground of action cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several; that the true test as to whether such action will lie is whether or not the act accomplished after the conspiracy has been formed is itself actionable."

We think that the proposition here asserted is well sustained by the authorities, and the first question to be determined is whether, on account of the acts charged by plaintiff against the defendants, he would have had a cause of action against either of them if no conspiracy had been charged.

If he would have had, then he may maintain his action for a conspiracy. If he could not have sustained a separate action against either of the defendants on account of the matters complained of, the additional charge of a conspiracy will not give it. *Cool. on Torts*, 125; *Kimball v. Harmon & Burch*; ¹ *Lavery v. Vanarsdale*.²

The appellee also asserts the following proposition, which may be conceded to be correct: "A person has an absolute right to refuse to have business relations with any person whomever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law which forces a man to part with his title to his property."

The privilege here asserted must be limited however to the individual action of the party who asserts the right. It is not equally true that one person may from such motives influence another person to do the same thing. If without such motive the cause of one person's interference with the property or privileges of another is to serve some legitimate right or interest of his own, he may do acts himself, or cause other persons to do them, that injuriously affect a third party so long as no definite legal right of such third party is violated.

In the case of *Walker v. Cronin*, it was recognized to be a general principle that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages. The intentional causing of such loss to another, without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong.

"There are indeed many authorities which appear to hold that to constitute an actionable wrong there must be a violation of some definite legal right of the plaintiff. But those are cases, for the most part at least, where the defendants were themselves acting in the lawful exercise of some distinct right, which furnished the defence of a justifiable cause for their acts, except so far as they were in violation of a superior right in another.

"Thus every one has an equal right to employ workmen in his busi-

¹ 34 Md. 407.

² 65 Pa. St. 507.

ness or service; and if by the exercise of this right in such manner as he may see fit persons are induced to leave their employment elsewhere, no wrong is done to him whose employment they leave, unless a contract exists by which such other person has a legal right to the further continuance of their services. If such a contract exists, one who knowingly and intentionally procures it to be violated may be held liable for the wrong, although he did it for the purpose of promoting his own business.

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

Plaintiff's petition goes further than to charge that each of the defendants refused to sell to him. It charges that they not only did that, but that they induced a third person to refuse to sell to him. It does not appear from the petition that their interference with the business of plaintiff was done to serve some legitimate purpose of their own, but that it was done wantonly and maliciously, and that it caused, as they intended it should, pecuniary loss to him.

We think the petition stated a cause of action and that the demurrer should have been overruled.

The judgment is reversed and the cause is remanded.

Reversed and remanded.

PASSAIC PRINT WORKS v. ELY & WALKER DRY
GOODS CO.

1900. 44 U. S. Circuit Court of Appeals, 426.¹

IN U. S. CIRCUIT COURT OF APPEALS, Eighth Circuit. Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

IN ERROR to U. S. Circuit Court for Eastern District of Missouri.

This case was determined below on a demurrer to the plaintiff's petition, which was sustained; and a final judgment was entered against the Passaic Print Works, the plaintiff below, it having declined to plead further.

The plaintiff's petition contained, in substance, the following allegations (*inter alia*):—

Plaintiff is a corporation engaged in the manufacture of prints or

¹ Statement rewritten. — Ed.

calicoes which it sells to jobbers or wholesale dealers in St. Louis and elsewhere, who in turn sell the same to the retail trade. In 1899 it had fixed on certain prices for certain specified brands of calicoes; and it had, prior to Feb. 25, 1899, received from several wholesale dealers in St. Louis orders for large amounts of said brands at the prices specified. On February 25, 1899, the defendant company, combining and conspiring among themselves and with others to the plaintiff unknown, and maliciously intending to injure the business of the said plaintiff, and to cause it great loss in money, and to break up and ruin the plaintiff's trade among the jobbers in St. Louis, maliciously caused a circular, in the name of the said defendant corporation, to be issued and sent out to the retail trade tributary to St. Louis. In the circular defendant company offered for sale several brands of calicoes manufactured by plaintiff at prices lower than those fixed by plaintiff. The brands were offered "as long as they last" at these reduced prices: "Prices for all items subject to change without notice, and orders accepted only for stock on hand." Plaintiff further alleged that it was informed and believed that defendant had but a small quantity of such goods to sell, and for that reason qualified its offer as above stated.

The petition further averred, that the effect of issuing this circular was to compel jobbers to whom plaintiff had already sold either to cancel their orders or to compel plaintiff to make a rebate on price, and to thereby break up the trade of plaintiff in St. Louis and the adjacent country, and to make the other jobbers in St. Louis afraid to deal in said brands except at greatly reduced prices and then in comparatively small quantities; and upon information and belief the plaintiff alleged "that the quotations of this plaintiff's said goods in the said circular were made by the said defendants with the end and object in this paragraph stated, and not for any legitimate trade purpose."

Edwin C. Hoyt, for plaintiff in error.

Wm. B. Thompson, for defendant in error.

THAYER, Circuit Judge, [after stating the case] delivered the opinion of the court.

The complaint filed in the lower court, the substance of which has been stated, shows by necessary intendment that when the circular of the defendant company was issued it had in stock a limited quantity of the four brands of calico of the plaintiff's manufacture which are therein described. The circular stated, in substance, that the defendant had such calicoes in stock, and the complaint did not deny that fact, but admitted it by averring that "the defendant corporation had but a small quantity of such goods to sell, and for that reason qualified its offer to sell by inserting in the circular after the name of the goods the words 'as long as they last.'" Moreover, the owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such

offer may be to depreciate the market value of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale. The right to offer property for sale, and to fix the price at which it may be bought, is incident to the ownership of property, and the loss which a third party sustains in consequence of the exercise of that right is *damnum absque injuria*. We are thus confronted with the inquiry whether the motive which influenced the defendant company to offer for sale such calicoes of the plaintiff's manufacture as they had in stock at the price named in its circular, conceding such motive to have been as alleged in the complaint, changed the complexion of the act, and rendered the same unlawful, when, but for the motive of the actor, it would have been clearly lawful. It is common learning that a bad motive — such as an intent to hinder, delay, and defraud creditors, by virtue of St. 13 Eliz. c. 5, and possibly by the rules of the common law — will render a conveyance or transfer of property void which, but for the bad motive, would have been valid. So, also, one who sets the machinery of the law in motion without probable cause, and for the sole purpose of injuring the reputation of another, or subjecting him to loss and expense, is guilty of an unlawful act which would have been lawful but for the improper motive. And one who, by virtue of his situation, has a qualified privilege to make defamatory statements concerning another, may be deprived of the benefit of that privilege by proof that it was not exercised in good faith, but in pursuance of a malicious intent to injure the person concerning whom the defamatory statement or statements were made. Poll. Torts (Webb's Ed.) pp. 331–335, and cases there cited. There is also some authority for saying that one who maliciously (that is, with intent to obtain some personal benefit at another's loss or expense) induces another to break his contract with a third party thereby commits an actionable wrong if special damage is disclosed, although the act done would have been lawful if the wrongful motive had been absent. *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; *Walker v. Cronin*, 107 Mass. 555. And see Poll. Torts (Webb's Ed.) pp. 668–673. Aside from cases of the latter kind, it is a general rule that the bad motive which inspires an act will not change its complexion, and render it unlawful, if otherwise the act was done in the exercise of an undoubted right. Or, as has sometimes been said, “when an act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive.” The question as to how far and under what circumstances a bad purpose will render an act actionable which, considered by itself, and without reference to the purpose which prompted it, is lawful, has been so much discussed since the decision in *Allen v. Flood*, [1898] 1 App. Cas. 1, that it would be profitless to indulge in further comment. It has been well observed that it would be dangerous to the peace of society to admit the doctrine that any lawful act can be transformed

prima facie into an actionable wrong by a simple allegation that the act was inspired by malice or ill will, or by an improper motive. It is wiser, therefore, to exclude any inquiry into the motives of men when their actions are lawful, except in those cases where it is well established that malice is an essential ingredient of the cause of action, or in those cases where, the act done being wrongful, proof of a bad motive will serve to exaggerate the damages.

The case at bar falls within neither of the exceptions to the general rule above stated, — that, if an act is done in the exercise of an undoubted right, and is lawful, the motive of the actor is immaterial. No one can dispute the right of the defendant company to offer for sale goods that it owned and were in its possession, whether the quantity was great or small, for such a price as it deemed proper. This was the outward visible act of which complaint is made, and, being lawful, the law will not hold it to be otherwise because of a secret purpose entertained by the defendant company to inflict loss on the plaintiff by compelling it to reduce the cost of a certain kind of its prints or calicoes.

Nor is the complaint aided in any respect by reference to the law of conspiracy, since the only object that the defendants had in view which the law will consider was the disposition or sale of certain goods which the defendant corporation had the right to sell; and the means employed to accomplish that end, namely, placing them on the market at a reduced cost, were also lawful.

In the brief filed in behalf of the plaintiff in error it is suggested finally that the complaint may be sustained on the ground that it states a good cause of action for maliciously causing certain persons to break or cancel their contracts with the plaintiff, but we think it quite obvious that the complaint was not framed with a view of stating a cause of action of that nature, and that it is insufficient for that purpose. It does not give the name of any person or corporation with whom the plaintiff had a contract for the sale of its prints which was subsequently broken in consequence of the wrongful acts of the defendant. Neither does it show that it had accepted any orders for goods which the jobber was not privileged to cancel at his pleasure. Nor does it allege any special damage incident to the breach of any particular contract. In view of all the allegations which the complaint contains it is manifest, we think, that it was framed with a view of recovering on the broad ground that the issuance of the circular was unlawful and actionable, provided the motive of the defendant company in issuing it was to occasion loss or inconvenience to the plaintiff.

We are of opinion that the complaint did not state a cause of action, as the trial court held, and the judgment below is therefore affirmed.

SANBORN, Circuit Judge (dissenting). I cannot concur in the opinion of the majority in this case because the petition alleges that the defendants by their advertisement of the goods manufactured by plaintiff, without any legitimate trade purpose, prevented jobbers from purchasing goods of the plaintiff, and caused those who had agreed to purchase from it to cancel their orders unless the plaintiff would make them a rebate, so that the plaintiff sustained damage in the sum of \$19,000. In my opinion, the gravamen of this cause of action is not the malicious intent or purpose of the defendants, but it is their wrongful act of interfering with the plaintiff's business, of preventing sales that it would have made, and of causing the cancellation of orders to, or contracts of purchase from, the plaintiff already made. This act, without any allegation or averment of intent or purpose, was itself wrongful, unless it was done for a justifiable purpose. The act of interfering with and injuring the trade or business of the plaintiff without justifiable cause entitled the plaintiff to damages. It is conceded that, if the defendants had advertised these prints for any legitimate trade purpose, for the purpose of selling them for gain for themselves, for the purpose of converting them into money because they preferred their advertised price to the goods, or for the purpose of competing in trade with the plaintiff, they would have had a justifiable cause for inflicting upon it the damages of which it complains, and these damages would then have been *damnum absque injuria*. But, if they had advertised them for any of these purposes, this case would have constituted an exception to the general rule of law. The general rule is that whenever one injures a man's business, profession, or occupation he is liable for the damages he inflicts. The exception is that, where the injury is caused by competition in trade or the lawful exercise of a right which the inflictor has, then the injury is justifiable, and no damages can be recovered. But, where such an injury is inflicted, the presumption always is that the rule, and not the exception, applies, and, if the inflictor would justify, he must show that he falls within the exception. The question in this case, therefore, is not whether or not the motive or intent of the defendants will make acts unlawful which were otherwise lawful, but whether or not the intent and purpose of the defendants will justify an otherwise unlawful act, and excuse them from the payment of damages for which, under the general rule of law, they are liable to the plaintiff. It is whether or not the petition shows that they advertised the goods for legitimate trade purposes, so that their acts fell within the exception, which justifies the infliction of damages, and not under the general rule, which requires them to compensate the plaintiff for the injury they have caused. The opinion of the majority assumes that the defendants advertised the prints for a legitimate trade purpose, so that their acts fell within the exception to the general rule. It overlooks the legal presumption that injury to one's business enti-

ties him to compensatory damages, and the plain averment of the petition that the acts of the defendants were not done for any justifiable cause, but were committed for the sole purpose of inflicting upon the plaintiff the injury they caused.

[After quoting from the averments in the petition.]

Now, no one will dispute the rules of law that the plaintiff in this action had the right to conduct its business of manufacturing and selling prints without the injurious interference of strangers, and that the defendants were subject to the universal rule that they must so use their own property and rights as to inflict no unnecessary injury upon their neighbors. The averments of this petition are that they were not using any of their property or exercising any of their rights for any legitimate trade purpose, but that they were using them for the express purpose of inflicting injury upon the plaintiff, and that they succeeded in imposing the infliction. These allegations seem to me to bring this case under the general rule of law, and to clearly negative the claim that it falls within the exception. They seem to state a good cause of action.

[The learned Judge here cited, and quoted from, various authorities.]

The proposition is sustained by respectable authority; it is just, and I believe it is sound, — that an action will lie for depriving a man of custom (that is, of possible contracts), when the result is effected by persuasion as well as when it is accomplished by fraud or force, if the harm is inflicted without justifiable cause, such as competition in trade. *Walker v. Cronin*, 107 Mass. 555, 565; *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524; *Hartnett v. Association*, 169 Mass. 229, 235, 47 N. E. 1002, 38 L. R. A. 194; *Dela v. Winfree*, 80 Tex. 400, 405, 16 S. W. 111; *Doremus v. Hennessy*, 62 Ill. App. 391, 403; *Van Horn v. Van Horn*, 52 N. J. Law, 284, 20 Atl. 485; *Temperton v. Russell*, 62 Law J. (Q. B. Div. 1893) 412, 419.

Under the legal principles to which reference has been made, and under the authorities which have been cited, the petition in this case states a good cause of action for interference with and injury to the business of the plaintiff by preventing it from obtaining custom it would otherwise have obtained, without any justifiable cause or excuse, and for this reason the demurrer should have been overruled, and the case sent to trial.

There is another reason why the judgment below should be reversed. It is that the petition sufficiently states a cause of action for maliciously interfering with contracts between jobbers in St. Louis and the plaintiff, and inducing the former to break their contracts to the injury of the latter.

For the reasons which have now been briefly stated, the judgment below should, in my opinion, be reversed, and the defendants should be required to answer the petition.

TUTTLE v. BUCK.

1908. 107 *Minnesota*, 145.

ACTION in the District Court for Wright County to recover \$10,000 damages. Defendant demurred to the complaint on the ground it did not state a cause of action. From an order, Buckham, J., overruling the demurrer, defendant appealed. Affirmed.

This appeal was from an order overruling a general demurrer to a complaint in which the plaintiff alleged:—

That for more than ten years last past he has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minnesota, where he resides, owning and operating a shop for the purpose of his said trade. That until the injury herein-after complained of his said business was prosperous, and plaintiff was enabled thereby to comfortably maintain himself and family out of the income and profits thereof, and also to save a considerable sum per annum, to wit, about \$800. That the defendant, during the period of about twelve months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business, and compel plaintiff to abandon the same. That to that end he has persistently and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given. That defendant is possessed of large means, and is engaged in the business of a banker in said village of Howard Lake, at Dassel, Minnesota, and at divers other places, and is nowise interested in the occupation of a barber; yet in the pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole and only purpose of injuring the trade of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said defendant has been or may be able by the means aforesaid to direct from plaintiff's shop. That at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted and furnished by the defendant, without paying any rent therefor, and under an agreement with defendant whereby the in-

come of said shop is required to be paid to defendant, and is so paid in partial return for his wages. That all of said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own. That by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, and through other unlawful means and devices by him employed, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of \$10,000.

Hall & Kollmer, for appellant.

A general allegation in a complaint is of no avail as against the specific facts pleaded therein. *Gowan v. Bense*, 53 Minn. 46; *Carlson v. Presbyterian Board of Relief*, 67 Minn. 436. Competition will not be restricted. *Chambers v. Baldwin*, 91 Ky. 121; *Doremus v. Hennessy*, 176 Ill. 608. Defendant's act was "damnum absque injuria." *Auburn v. Douglass*, 9 N. Y. 444; *Bohn Mnfg. Co. v. Hollis*, 54 Minn. 233; *Ertz v. Produce Exchange*, 79 Minn. 143. The motive of competition is immaterial. *South Royalton v. Suffolk*, 27 Vt. 505; *Wilson v. Berg*, 88 Pa. St. 167; *Kiff v. Youmans*, 86 N. Y. 324; *Boyson v. Thorn*, 98 Cal. 578; *Glencoe v. Hudson*, 138 Mo. 439; *Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611.

F. E. Latham and *Daniel Fish*, for respondent.

The rule of fair play is more and more enforced by the courts. *Stillwater Water Co. v. Farmer*, 89 Minn. 58, and 92 Minn. 230; *Barclay v. Abraham*, 121 Iowa, 619; *Burke v. Smith*, 69 Mich. 380; *Kirkwood v. Finegan*, 95 Mich. 543; *Passaic v. Ely*, 62 L. R. A. 673, Note.

ELLIOTT, J. (after stating the facts as above).

It has been said that the law deals only with externals, and that a lawful act cannot be made the foundation of an action because it was done with an evil motive. In *Allen v. Flood*, [1898] A. C. 1, 151, Lord Watson said that, except with regard to crimes, the law does not take into account motives as constituting an element of civil wrong. In *Mayor v. Pickles*, [1895] A. C. 587, Lord Halsbury stated that if the act was lawful, "however ill the motive might be, he had a right to do it." In *Raycroft v. Tayntor*, 68 Vt. 219, 35 Atl. 53, 33 L. R. A. 225, 54 Am. St. 882, the court said that, "when one exercises a legal right only, the motive which actuates him is immaterial." In *Jenkins v. Fowler*, 24 Pa. St. 308, Mr. Justice Black said that "malicious motives make a bad act worse, but they cannot make that wrong which, in its own essence, is lawful." This language was quoted in *Bohn Mnfg. Co. v. Hollis*, 54 Minn. 223, 233, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. 319, and in substance in *Ertz v. Produce Exchange*, 79 Minn. 140, 143, 81 N. W. 737, 48 L. R. A. 90, 79 Am. St. 433. See also 2 Cooley, Torts (3d Ed.) 1505; *Auburn v. Douglass*, 9 N. Y. 444.

Such generalizations are of little value in determining concrete cases.

They may state the truth, but not the whole truth. Each word and phrase used therein may require definition and limitation. Thus, before we can apply Judge Black's language to a particular case, we must determine what act is "in its own essence lawful." What did Lord Halsbury mean by the words "lawful act"? What is meant by "exercising a legal right"? It is not at all correct to say that the motive with which an act is done is always immaterial, providing the act itself is not unlawful. Numerous illustrations of the contrary will be found in the civil as well as the criminal law.

We do not intend to enter upon an elaborate discussion of the subject, or become entangled in the subtleties connected with the words "malice" and "malicious." We are not able to accept without limitations the doctrine above referred to, but at this time content ourselves with a brief reference to some general principles.

It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Necessarily its form and substance have been greatly affected by prevalent economic theories.

For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in *Stillwater Water Co. v. Farmer*, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541, Id., 92 Minn. 230, 99 N. W. 882, and *Barclay v. Abraham*, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am. St. 365.

Many of the restrictions which should be recognized and enforced result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a wilful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern, and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a positive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, *Torts* (8th Ed.), p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, wilfully and intentionally, without just cause or excuse."

In *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330, Mr. Justice Hammond said: "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in *Allen v. Flood*, as reported in [1898] A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate."

Similar language was used by Mr. Justice Wells in *Walker v. Cronin*, 107 Mass. 555; by Lord Coleridge in *Mogul Steamship Co. v. McGregor*, 21 Q. B. Div. 544-553; by Lord Justice Bowen in the same case, 23 Q. B. Div. 593; by Mr. Justice Holmes in *Aikens v. Wisconsin*, 195 U. S. 194, 204, 25 Sup. Ct. 3, 49 L. Ed. 154; by Chief Justice McSherry in *Klingel v. Sharp*, 104 Md. 233, 64 Atl. 1029, 7 L. R. A. (N. S.) 976, 118 Am. St. 399; and by Judge Sanborn in his dissenting opinion in *Passaic Print Works v. Ely & Walker Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673. Numerous cases

will be found referred to in the note to this case in 62 L. R. A. 673, and in an article in 18 Harvard Law Rev. 411.

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the justices, however, are of the opinion that, on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

JAGGARD, J., dissents.¹

¹ [Compare 18 Harvard Law Review, p. 420, and 20 Harv. Law Rev. pp. 453-455. — Ed.]

ALLEN, APPELLANT, v. FLOOD AND TAYLOR, RESPONDENTS.

1897. *Law Reports*, (1898) *Appeals*, 1.¹

THE plaintiffs (now the respondents), Flood and Taylor, are members of the Shipwrights' Provident Union. The defendant (now the appellant), Allen, is a member and the London delegate of the Independent Society of Boilermakers and Iron and Steel Shipbuilders. The latter society restricts the labor of its members to ironwork. The society of shipwrights permits its members to work either in wood or iron. The members of the boilermakers' society are accustomed to claim that the proper business of shipwrights is to work in wood only, and that shipwrights who work in iron are trespassing on the trade of the boilermakers' union.²

In April, 1894, about forty men of the boilermakers' society were engaged at the Regent Dock, Millwall, in repairing an iron ship, on the employment of the Glengall Iron Company. Flood and Taylor were at the same time employed by the Glengall Company to execute repairs upon the woodwork of the vessel. By the terms of their employment they were entitled to leave at the close of any day; and the Glengall Company might, at the close of any day, cease to employ them further. The ironworkers were employed on similar terms.³

The boilermakers, on discovering that Flood and Taylor had shortly before been employed by another firm (Mills & Knight) on the Thames in doing ironwork on a ship, became much excited, and began to talk of leaving their employment. One of them telegraphed for Allen, their London delegate. Allen came, dissuaded them from leaving work at dinner-time, and told them that they must wait and see how things were settled. Allen then had an interview with Halkett, the Glengall Company's manager. As to what took place at this interview, the testimony at the subsequent trial was conflicting. The version most favorable to the plaintiffs was substantially as follows:—

Allen told Halkett that he (Allen) had been sent for because Flood and Taylor were known to have done iron work in Mills & Knight's yard, and that unless Flood and Taylor were discharged all the members of the

¹ Statement rewritten. Arguments omitted. Some of the opinions are entirely omitted; and none are given in full. — Ed.

² . . . "The litigants are members of two rival associations of workingmen, registered under the Trade Unions Act of 1871." . . . LORD WATSON, L. R. (1898) *Appeals*, p. 90. "It is not a dispute between employers and employed, — between capital and labor, — but rather one between the members of one trade union and of another trade union." . . . LORD ASHBORNE, *ibid.* p. 109. "Each party had the financial support of their union." LORD MACNAGHTEN, p. 147. — Ed.

³ As to the terms of the ironworkers' employment, see LORD WATSON, pp. 90, 99; and LORD HERSCHELL, p. 130. — Ed.

boilermakers' society would be "called out" or "knock off" work that day; that Halkett had no option; that there was no ill-feeling towards the Glengall Company or towards Flood and Taylor personally,¹ but that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and that wherever these men were employed, or other shipwrights who had done ironwork, the boilermakers would cease work,—in every yard on the Thames.

If the boilermakers had been called out, it would have stopped the Glengall Company's business. For fear that the threat would be carried out, Halkett discharged Flood and Taylor at the close of the day.

An action was then brought by Flood and Taylor against three persons, viz., Allen, the London delegate; Jackson, the chairman; and Knight, the general secretary of the Boilermakers' Society.² The plaintiffs' allegations were: that the defendants, maliciously and wrongfully and with intent to injure the plaintiffs, procured and induced the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them; and also, maliciously, etc., intimidated and coerced the Glengall Company to break their contract with plaintiffs and not to enter into new contracts, and also unlawfully and maliciously conspired with others to do the above acts.

The case was tried by jury before KENNEDY, J.

The learned judge ruled that there was not "a shred of evidence of any conspiracy at all;" that there was "no evidence of anything amounting to intimidation or coercion in any legal sense of the term;"³ and that there was no breach of contract.

The following questions, among others, were put to the jury:—

1. Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs or either of them from their employment?

2. Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs or either of them?

In putting these questions to the jury, KENNEDY, J., gave some explanations, portions of which are, in substance, as follows:⁴ "The word 'malice' is a word of art in law, and it does not mean in this case a personal dislike, a personal feeling of resentment against the two plaintiffs. It is clear from the evidence of the men and of their employers that there was no such personal feeling in this case. The question that I want you to answer is, that, if you find he induced the Glengall Iron Company, by the threat which is suggested by the plaintiffs of calling out

¹ See LORD MACNAGHTEN, p. 146. — Ed.

² It was held, both by KENNEDY, J., and by the Court of Appeal, that Jackson and Knight were not liable. Upon this branch of the case there was no appeal to the House of Lords. — Ed.

³ See LORD MACNAGHTEN, p. 148. — Ed.

⁴ The statement here given is compiled from extracts recited in the opinions of LORD SHAFF, p. 103, LORD HALSBURY, p. 82, and LORD MACNAGHTEN, p. 149. — Ed.

all the men on strike, did he do that with the malicious intention which I have endeavored to explain, that is, merely, not for the purpose of forwarding that which he believed to be his interest as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs, and preventing them doing that which they were each of them entitled to do. 'Maliciously' means, connected with the word 'induce,' this, — that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business."

The jury answered both questions in the affirmative; and also found that each plaintiff had suffered 20*l.* damages.

After consideration, KENNEDY, J., entered judgment for the plaintiffs against Allen for 40*l.* This decision was affirmed by the Court of Appeal (LORD ESHER, M. R., LOPES and RIGBY, L. JJ.); L. R. (1895) 2 Q. B. 21.

Against these decisions, Allen brought the present appeal to the House of Lords. The appeal was first argued in December, 1895. Their Lordships having required further argument, the appeal was reargued in March and April, 1897. The following Judges were summoned to attend¹ at the second argument: HAWKINS, MATHEW, CAVE, NORTH, WILLS, GRANTHAM, LAWRENCE, and WRIGHT, JJ.

The case was argued by *Cohen, Q. C.*, and *Robson, Q. C.* (*E. Morten* with them), for the appellant; and by *Lawson Walton, Q. C.*, and *Rufus Isaacs*, for the respondent.

At the close of the arguments, the following question was propounded to the Judges: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?

The Judges desired time to consider, and on June 3, 1897, each Judge delivered his opinion.

MATHEW, J., and WRIGHT, J., answered the question in the negative; and the other six Judges in the affirmative.

After the delivery of the opinions of the Judges, the House took time for consideration.

Dec. 14, 1897. LORD HALSBURY, L. C. * * * * The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly

¹ See 13 *Harv. Law Rev.* 353. — Ed.

suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognized by law, or, at all events, only such a right as every one else is entitled to deprive them of if they stop short of physical violence or obstruction. I think the right to employ their labor as they will is a right both recognized by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

Very early authorities in the law have recognized the right; and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action, the quarry owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means: the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who was assaulted; it was not the quarry owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

My Lords, in my view these are binding authorities to show that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action, which, in my view, may be found running through the principles of our law.

* * * * *

First it is said that the company were acting within their legal rights in discharging the plaintiffs. So they were; but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The scholars who went away from the school were entitled to do so. The miners were entitled to cease working at the quarry. The natives were entitled to avoid running the risk of being shot; but the question is, What was the cause of their thus exercising their legal right?

The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him.

* * * * *

It will be observed that Kennedy, J., draws a distinction between the conduct which he assumes to be lawful on Allen's part to do what he did do if it were merely for the purpose of forwarding that which he believed to be his interest as a delegate of his union in fair consideration of that interest on the one hand, and on the other hand his conduct if what he did was done for the purpose of injuring these plaintiffs.

My Lords, it appears to me that that is a direction of which the defendants cannot complain, since it puts what is to my mind an alternative more favorable to them. In my view, his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do. It is alleged, and to my mind and to the mind of the jury proved, that the employers were compelled under pressure of the threats that he used to discharge the plaintiffs.

* * * * *

But the objection made by the defendants appears to be that the word "malicious" adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was unlawful, — the addition of the word "malicious" can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances.

In a decision of this House it has undoubtedly been held that whatever a man's motives may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbor's land. But that is because the neighbor had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others.

But, referring to Bowen, L. J.'s observation, which to my mind is exactly accurate, "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade," you must have some just cause or excuse.

Now, the word "malicious" appears to me to negative just cause or excuse; and without attempting an exhaustive exposition of the word itself, it appears to me that, if I apply the language of Bowen, L. J., it is enough to show that this was within the meaning of the law "malicious."

It appears to me that no better illustration can be given of the distinction on which I am insisting between an act which can be legally done and an act which cannot be so done because tainted with malice, than such a colloquy between the representative of the master and the representative of the men as might have been held on the occasion which has given rise to this action. If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did.

I see it is suggested by one of your Lordships that the action for malicious prosecution is supposed to be an exception. I am not quite certain that I understand what is the proposition to which it is an exception. If it means that there is no other form of procedure known to the law wherein malice may

make the distinction between a lawful and an unlawful act, I am unable to agree. Maliciously procuring a person to be made a bankrupt, maliciously and without reasonable or probable cause presenting a petition to wind up a company, or maliciously procuring an arrest, are equally cases wherein the state of mind of the person procuring the arrest may affect the question of the lawfulness or unlawfulness of the act done.

Again, in slander or libel the right to preserve one's character or business from attack appears to me quite as vague and general a right as it is suggested is the right to pursue one's occupation unmolested; and it cannot be denied that in both these cases the lawfulness or unlawfulness of what is said or written may depend upon the absence or presence of malice.

Doubtless there are cases in which the mere presence of malice in an act done will not necessarily give a right of action, since no damage may result; and in this case, however malicious Allen's intervention may have been, if the employers had defied Allen's threats instead of yielding to them, the plaintiffs could not have succeeded in an action, because they would not have been injured: see *Quartz Hill Co. v. Eyre*, 11 Q. B. D. 674; *Gibbs v. Pike*, 9 M & W. 351; *Jenings v. Florence*, (1857) 2 C. B. (N. S.) 467.

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LORD WATSON. * * * * * There is no expression in the verdict which can be held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman does not imply or even suggest the absence of his legal right to do either as he may choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word "maliciously," — a word which is susceptible of many different meanings. The expression "maliciously induce," as it occurs upon the face of the verdict, is ambiguous: it is capable of signifying that the appellant knowingly induced an act which of itself constituted a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive, would not have amounted to a civil wrong; and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy.

These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this,—that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognizes, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive.

[After quoting from BOWEN, L. J., in *Mogul Steamship Co. v. McGregor*, and BAYLEY, J., in *Bromage v. Prosser*.]

The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive, namely, an intention to injure the respondents in their trade or calling of shipwrights.

* * * * *

There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley v. Gye*, 2 E. & B. 216, the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party.

* * * * *

Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley v. Gye*, 2 E. & B. 216, already referred to, a person who by illegal means, that is, means which in themselves are in the nature of civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word "means" is understood in its natural and proper sense, that

rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feeling with outward acts, and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned judges who lent their assistance to the House have favored the argument, that the appellant used coercion as a means of compelling the Glengall Iron Company to terminate their connection with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Company, who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act. According to the doctrine ventilated in *Temperton v. Russell*, [1893] 1 Q. B. 715, and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive.

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I have already indicated that, in my opinion, no light is thrown upon the decision of the present question by *Pitt v. Donovan*, 1 M. & S. 639, and other cases of that class. The defendant had in that case represented, contrary to the fact, that the plaintiff was insane at the time when he executed a particular deed. The communication was made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true; and the defendant was in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law in certain exceptional cases excuses the perpetration of a wrong, by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong.

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[The opinions of LORD ASHBOURNE, and LORD MORRIS, concurring with LORD HALSBURY, are omitted.]

LORD HERSCHELL.

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Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient. I have always understood, and I think that has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is *prima facie* wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men

might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this is a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories, it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from showing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

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If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbor or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the Courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbor or of benefiting one's self at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does go far to show that such an action cannot be maintained.

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I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that every one has a right to pursue his trade or employment without "molestation" or "obstruction," if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that every one has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has

no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work, is in law a right of precisely the same nature, and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shown to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling?

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[After stating the case of *Mogul Steamship Co. v. McGregor.*]

It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that competition is regarded with special favor by the law; at all events, I see no reason why it should be so regarded. It may often press as hardly on individuals as the defendant's acts are alleged to have done in the present case. But if the alleged exception could be established, why is not the present case within it? What was the object of the defendant, and the workmen he represented, but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labor, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of shipowners who induce merchants not to enter into contracts with the plaintiffs, by the prospect that if at any time they employ the plaintiffs' ships they will suffer the penalty of being made to pay higher charges than their neighbors at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases.

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LORD MACNAGHTEN. My Lords, I am sorry to say that I must begin by recapitulating the facts of the case. For the findings of the jury, taken by themselves, do not convey to my mind any definite meaning. The jury have found that the appellant Allen "maliciously induced" the Glengall Iron Company to discharge the respondents from their service, and they have awarded damages in consequence. I do not know what the jury meant by the word "induced;" I am not sure that I know what they meant by the word "maliciously." Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself. I am therefore compelled to turn for help to the evidence at the trial, accepting, as I suppose the jury must have accepted, the account given by the respondents in preference to that offered by the appellant wherever there may be any shadow of difference between them.

[After a full statement of the evidence.]

Now before I proceed to consider the legal grounds on which Kennedy, J., and the Court of Appeal decided the case against Allen, I should like to ask what there was wrong in Allen's conduct. He had nothing to do with the origin of the ill-feeling against Flood and Taylor. He did nothing to increase it. He went to the dock simply because he was sent for by one of the men of his union. It seems to be considered the duty of a district delegate to listen to the grievances of the members of his union within his district, and to settle the difficulty if possible. The jury found that the settlement of this dispute was a matter within Allen's discretion. The only way in which he could settle it was by going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned, the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work among them.

If so, it is difficult to see why fault should be found with Allen for going in their place and on their behalf and saying what they would have said themselves.

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As regards the meaning of the word "induce," I do not think the jury got much assistance. I rather gather from the summing-up that the jury were given to understand that if they thought that Allen merely represented the state of things as it was — and the feeling of the iron-men at the Regent's Dock — they would be at liberty to answer the questions put to them about Allen in the negative. But the answer must be the other way if they thought that Allen went further, and assumed to represent the union, and to speak as if he had the power of the union at his back; that would be a threat and would amount to "inducing." Now, I must say that I do not think it can be said that Allen did "induce" the company to discharge the plaintiffs. Certainly it cannot be truly said that he procured them to be discharged. It was not his act that prevented the company from continuing to employ them. If the whole story had been a fiction and an invention on his part I could have understood the finding of the jury. But I do not think there was any misrepresentation on Allen's part. I do not think there was any exaggeration. Nor, indeed, was any such point made at the trial.

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So we see now, I think, what the findings of the jury come to, if they are to be treated as being in accordance with the evidence. They must mean that Allen induced the company to discharge the plaintiffs, by representing to the manager, not otherwise than in accordance with the truth, the state of feeling in the yard, and the intentions of the workmen, and that he did so "maliciously," because he must have known what the issue of his communication to the manager would be, and naturally perhaps he was not sorry to see an example made of persons obnoxious to his union. But is his conduct actionable? It would be very singular if it were. No action would lie against the company for discharging the two shipwrights. No action would lie against the

iron-men for striking against them. No action would lie against the officers of the union for sanctioning such a strike. But if the respondents are right the person to answer in damages is the man who happened to be the medium of communication between the iron-men and the company, — the most innocent of the three parties concerned, for he neither set the "agitation" on foot, nor did he do anything to increase it, nor was his the order that put an end to the connection between employer and employed. It seems to me that the result would have been just the same if Edmonds had told Mr. Halkett what was going on in the yard, or if Mr. Halkett had learned it from Flood and Taylor themselves.

Even if I am wrong in my view of the evidence and the verdict, if the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word, and that he procured the dismissal of Flood and Taylor, that is, that it was his act and conduct alone which caused their dismissal, and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct, if it could be inquired into, was without justification or excuse.

The case may be different where the act itself to which the loss is traceable involves some breach of contract or some breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point.

But if the immediate agent cannot be made liable, though he knows what he is about, and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong. But if that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement, — suppose a man declines to give a servant a character because he is offended with the servant for leaving, — suppose a person of position takes away his custom from a country tradesman in a small village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling, — no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend of his not to employ the tradesman any more. Neither the one nor the other is liable for taking away his own custom. Is it possible that the one can be

made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is, that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion. Much more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character, and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation and wide scope for prejudice.

In order to prevent any possible misconstruction of the language I have used, I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of "boycotting," and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case, conspicuously absent.

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LORD SHAND. * * * * * The case was one of competition in labor, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply; and I ask myself what would be the thought of the application of the word "malicious" to the conduct of a tradesman who induces the customer of another tradesman to cease making purchases from one with whom he had long dealt, and instead to deal with him, a rival in trade. The case before the jury was, in my view, in no way different, except that in the one case there was competition in labor, — in the other there would be competition in trade.

Some of the learned consulted judges speak of Allen's conduct as having been caused by a desire to inflict "punishment" on the shipwrights for past acts, and indicate that, if the shipwrights had been actually working at ironwork on the vessel at the time, the case would have been different.¹

I cannot agree in any such view. "Punishment" in a wide and popular sense may possibly be used, though incorrectly, to describe the boilermakers' action; but it is quite clear that what they were resolved to do, and really did, was,

1. . . "There is no ground for even a suggestion that the defendant's acts were due to competition in trade or employment. There could be no competition between the two sets of men in the circumstances under which they were then working, the one at wood, the other at iron only; and even if they were competing, the plaintiffs were working well within their right." HAWKINS, J., p. 23. "Now, although according to the principles of the *Mogul Case* the action of Allen might have been justified on the principles of trade competition, if it had been confined to the time when the respondents were doing ironwork, and were therefore acting in competition with the boilermakers, it appears to me that as soon as he overstepped those limits, and induced their employers to dismiss them by way of punishment, his action was without just cause or excuse, and, consequently, malicious within the legal meaning of that word." CAVE, J., p. 37. "This action was not an effort, by competition, to enable the boilermakers to get the work instead, but to punish the plaintiffs by causing the employment of other shipwrights in their room." LORD ASHBURN, p. 111. — ED.

while marking their sense of the injury which they thought (rightly or wrongly is not the question) the shipwrights were doing to them in trenching on their proper line of business, to take a practical measure in their own defence. Their object was to benefit themselves in their own business as working boiler-makers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as "malicious," even in any secondary sense that can reasonably be attributed to that term, I cannot see.

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Coming now directly to the merits of the question in controversy in the case, the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted judges seem to me to fail, because, although it is no doubt true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and indeed the same right, on the part of other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Amongst the rights of all workmen is the right of competition. In the like manner and to the same extent as a workman has a right to pursue his work or labor without hindrance, a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition, — competition which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled in so far as competition in trade is concerned by the judgment of this House in the *Mogul Steamship Co. Case*, [1892] A. C. 25. I can see no reason for saying that a different principle should apply to competition in labor. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons, and in intimating that resolution to his employers.

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[The opinions of LORD DAVEY and LORD JAMES OF HEREFORD, in favor of reversing the order of the Court of Appeal are omitted. — Ed.]

Order of the Court of Appeal reversed and judgment entered for the appellant with costs here and below including the costs of the trial ; cause remitted to the Queen's Bench Division.

NOTE. The German Civil Code, enacted in 1896 and taking effect in 1900, contains the following provisions: —

Section 226. The exercise of a right is not permitted, when its sole object is to injure another.

Section 226. Whoever intentionally inflicts damage upon another in a morally reprehensible manner is bound to compensate the other for the damage.

LEATHEM v. CRAIG ET ALs.

1899-1900. *Law Reports, Ireland* (1899), 2 Q. B. & Ex. Div. 667, 744.

QUINN v. LEATHEM.

1901. *Law Reports* (1901), *Appeal Cases*, 495.¹

IN THE QUEEN'S BENCH DIVISION, IRELAND.

NEW TRIAL MOTION.

THIS was an action tried before FitzGibbon, L. J., at the Belfast Summer Assizes, 1896, brought against the defendants for damages for maliciously and wrongfully procuring certain persons to break contracts into which they had entered with the plaintiff, and not to enter into other contracts with the plaintiff; and for maliciously and wrongfully enticing and procuring certain workmen in the employment of such persons to leave the service of their employers and to break their contracts of service, with intent to injure the plaintiff, and to prevent such persons from carrying out their contracts with the plaintiff, and from entering into other contracts with the plaintiff; and for maliciously and wrongfully intimidating such persons, and coercing them to break their contracts with the plaintiff; and intimidating such servants in their employ, and coercing them to leave the service of their employers, to the injury of the plaintiff; and for unlawfully conspiring, together with other persons, to do the acts aforesaid, with intent to injure the plaintiff.

There was also a paragraph in the statement of claim, claiming damages for the publication of the plaintiff's name in a "black list," issued by the defendants, and a prayer for an injunction to prevent the continuance and repetition of the acts complained of.

The following facts were proved. The plaintiff was a butcher at Lisburn, in the country of Antrim, about eight miles from Belfast, where he had carried on business for a number of years. He had in his employment one Robert Dickie, his foreman, who had been with him for ten years. The plaintiff had been in the habit of sending large quantities of meat to Andrew Munce, a butcher in Belfast, and had been doing so for some twenty years. There was no contract in writing between them; but, whatever amount the plaintiff sent, Munce took and paid for — the amount being, on an average, of the value of £30 a week.

The defendants John Craig, John Davey, and Joseph Quinn were butchers' assistants in Belfast; and the defendants, Henry Dornan and

¹ Some opinions are omitted. None are given in full. Arguments omitted. — Ed.

Robert Shaw, butchers' assistants in Lisburn. In the spring of 1895 these defendants and several others in the same occupation formed themselves into an association, which was duly registered under the Trade Union Acts, 1871 and 1876, under the title of "The Belfast Journeymen Butchers' Assistants' Association," of which the defendant Davey became the Secretary. The plaintiff's men were not members of the association. At the commencement of July, 1895, the defendants' association required the plaintiff to dismiss Robert Dickie from his employment, which he refused to do. Upon that the defendants' society threatened to withdraw the plaintiff's men from his service. A deputation was sent down to meet the plaintiff at Lisburn, and a meeting was held in Magill's public-house, Lisburn, on the 9th July, at which the defendants Craig, Quinn, Dornan, and Shaw were present—Craig being in the chair. The plaintiff stated that he had come on behalf of his men, and was ready to pay all fines and demands against them, and asked to have them admitted into the society. The defendant Shaw objected, and said that the plaintiff's men should be punished, and should be put out to walk the streets for twelve months. The plaintiff objected to this, as Dickie was a married man with a family. Shaw moved, and Morgan seconded a resolution that the plaintiff's assistants should be called out, and it was carried. The defendants stated that they could pick out plenty of men to work for the plaintiff from their list; the plaintiff replied that they were not suitable for his business, and refused to put his own men out. Craig then said that the plaintiff's meat would be stopped at Munce's, if the plaintiff would not comply with their wishes. The plaintiff still refused. The defendants then called out some of the plaintiff's employees. Edward Dickie, a servant of the plaintiff, was brought to a meeting of the defendants' society, held over Dornan's shop in Lisburn, and was ordered to leave the plaintiff, the society undertaking to pay him the same wages as he had been receiving from the plaintiff. Dickie, yielding to this order, left the plaintiff without notice. "Black lists" were issued by the society upon which the names of persons were posted who had offended against the society's rules. Leatham's name was posted, and also the name of John M'Bride, a flesher in Lisburn, who was dealing with the plaintiff. Subsequently, however, Dornan and others of the defendants came to M'Bride; and on his undertaking not to deal any more with Leatham, his name was struck out.

On the 6th September, 1895, the defendant Davey wrote to the plaintiff the following letter:—

"I have been instructed to write you if you would be kind enough to reply on or before Tuesday, 10th, whether you have made up your mind to continue to employ non-union labour. If you continue as at present, our society will be obliged to adopt extreme measures in your case. Trusting that you will see the wisdom of acceding to our views at once, I remain," &c.

On the 13th September Davey wrote to Munce : —

"A deputation has been appointed to wait on you, or your responsible representative, on Monday evening, the 16th inst., at 6.30 p. m., to come to a decision in regard to this case of Leatham & Sons, as we are anxious to have a settlement at once."

To this Munce replied : —

"In reply to your letter re Leatham & Sons, I cannot see my way to attend any deputation of the sort, as it is quite out of my province to interfere with the liberty of any man. But why refer to me in this matter? I do not think it fair for you to come at me in the matter, seeing it appears to be the Messrs. Leatham that you wish to interfere with."

On the 16th September a deputation of the defendants' society went to Munce's establishment, and had an interview with W. F. Munce, the son of Andrew Munce, and asked him to put pressure on his father to stop dealing with the plaintiff. W. F. Munce replied by letter on the 17th September : —

"A deputation of the Journeymen Butchers' Association waited at Corn Market yesterday evening, with reference to the case of the purchase of meat from Henry Leatham, Lisburn. In accordance with promise, I placed the views of the deputation before Mr. Munce, and in reply he wishes to state he could not interfere to bring pressure to bear on Mr. Leatham to employ none but society men, by refusing to purchase meat from him, as that would be outside his province, and would be interfering with the liberty of another man; but at the same time he will strongly recommend Mr. Leatham to adopt the views of the Journeymen Butchers' Association, and employ men belonging to the society."

On the 18th September Davey wrote to Andrew Munce : —

"Have submitted your letter to committee. They are of opinion that in the main it is unsatisfactory, but thanking you kindly for your recommendation to Mr. Leatham, with whom we have endeavoured to make a satisfactory arrangement, but have failed; so therefore have no other alternative but to instruct your employees to cease work immediately Leatham's beef arrives."

On the 19th September Munce telegraphed to Leatham : —

"Unless you arrange with society you need not send any beef this week, as men are ordered to quit work."

Munce ceased to deal with the plaintiff, and the plaintiff was obliged to sell off the meat he had on hand at a heavy loss at any price he could get. In consequence of these transactions the plaintiff's business was ruined.

The case was tried before FitzGibbon, L. J., at the Summer Assizes of 1896, at Belfast. The defendants did not offer any evidence, their counsel asking for a direction on the grounds: 1, that to sustain the action a contract made with Leatham must be proved to have been made and broken through the acts of the defendants, and that there

was no evidence of such contract or breach; 2, that there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants; 3, that the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

The learned Lord Justice declined to withdraw the case from the jury, and left to them the following questions:—

1. Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? *Answer*: Yes.

2. Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment; and were such persons so induced not so to do? *Answer*: Yes.

3. Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black lists" with intent to injure the plaintiff in his business; and, if so, did the publication so injure him? *Answer*: Yes.

FitzGibbon, L. J., in summing up, told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action; and he advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. He declined to tell them that, if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. He told them that, if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account. The Lord Justice did not tell the jury that the liability of the defendants depended on any question of law. He told them that the questions left to them were questions of fact to be determined on the evidence; but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. The Lord Justice did not tell the jury that the defendants could be directly asked what their own intention was, but he did tell them that their intention was to be inferred from their acts and conduct as proved, and that, in acting upon the evidence given by the plaintiff, they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify, or contradict any of the evidence given for the plaintiff as to their own acts. Upon the meaning of the words "wrongfully and maliciously" in the questions, the Lord Justice told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be

actionable, namely, securing or advancing their own interests, or those of their trade, by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade, through a combination and with a common purpose, to prevent the free action of his customers and servants in dealing with him, with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. Finally, he told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful and were not actionable so long as no wrongful act was maliciously — that is intentionally — done to injure a third party. To constitute such a wrongful act for the purposes of this case, the Lord Justice told the jury that they must be satisfied that there had been a conspiracy, a common intention, and a combination, on the part of the defendants to injure the plaintiff in his business; and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade; and that whether the acts of the defendants were or were not in that sense actionable, was the question which the jury had to try upon the evidence.

The jury found for the plaintiff with £250 damages, of which £50 was separately assessed for damages on the cause of action relating to the "black list," and £200 for damages on the other causes of action; and judgment was thereupon entered for the plaintiff for £250 damages and costs.

The defendants now moved to set aside the verdict and judgment so had, and that judgment should be entered for them on the ground of misdirection; or for a new trial, on the ground that the damages were excessive, and that the jury were allowed to take the "black lists" into account.

O'Shaughnessy, Q. C., Campbell, Q. C., and M'Grath, for the defendants.

Serjeant Dodd, Gordon, Q. C., and Chambers, for the plaintiff.

Cur. adv. vult.

WILLIAM O'BRIEN, J. . . .

The right infringed is the right to live by labour.

Physical hindrances, or prevention of labour by physical means, it was conceded, would be the invasion of a right, and that would certainly be the case whether the restraint was applied to the employer or to the workman.

If temporal loss were not coercion, it could be used to the degree of a person being starved. The proposition on which the judgment of

the majority (in *Allen v. Flood*) was founded in this respect is opposed to the whole analogy of the law that makes duress of property, or menace of temporal loss, as effectual as physical violence to avoid all kinds of acts.

In *The Mogul Steamship Company v. M'Gregor*, (1892) A. C. 25, the trade of the defendants was the primary object, and the injury to the plaintiffs was the result of the means taken to advance that object. There, as in *Allen v. Flood*, (1898) A. C. 1, the injury to others was the thing intended, as the means of carrying out another object.

There is an observation which appears to me to gather up several of the fallacies which are scattered through the arguments in the judgments of the majority in *Allen v. Flood*, (1898) A. C. 1. The case is put by Lord Watson as if it were a question whether a person could be made liable for doing, from a malicious motive, what, without such motive he could do lawfully. In fact there are cases in law in which the malice makes the distinction of what is lawful or unlawful, as in malicious prosecution, or takes away the right that otherwise exists, as in the instance of privileged communication. But that is not the present case at all, as it was not that of *Allen v. Flood*, (1898) A. C. 1. The defendant, who maliciously instigated the thing, is not the person who possessed the power of dismissal. Therefore the supposed constitutional objection, that the law could not enter into a man's mind, has no place. The same point meets the case of the butler and the cook that was put in the argument. The butler tells his master he will leave unless the cook is dismissed. Lord Herschell snatched at the admission of counsel, that the cook could bring an action, as being the logical conclusion from his argument. With great respect, it is neither logical nor the law. The servant is the master of his own actions. He can choose his own company, though even for that object he cannot use threats. But in this case it was another person that assumed to choose his company for him. Allen was not a boiler-maker, as Craig was not a butcher, who wished to leave. Each was a member of a trade organization, and had no duty or interest of his own to interfere. What relation could such a position assume but that of intimidation?

... a confusion of relations, in applying the proposition that a person cannot be made liable for maliciously exercising a right which he possesses. The action here is for maliciously causing another person to exercise a right which that other person possessed. In one case, the right may be said to absorb the malice, though there are exceptions to the rule in the common law. But how can it absorb another man's malice?

What wrong can be conceived more cruel and grievous than wil-

fully depriving men of their employment? There must be a right, correlative to the wrong. What right can be more sacred than the right to live by a man's labor? But then, it is said, the wrong and the right are subject to the legal power of another person. That is the case in many instances, in which the law nevertheless gives a remedy for wrong that requires the exercise of another person's will. That is the case of a person who is defamed; the damage comes from those who hear. That is the case of malicious prosecution; the agency is that of the law. The servant who is enticed away from his master, leaves of his own will. The woman who left her husband, in *Winsmore v. Greenbank*, Willes, 577, did so with her own consent; the actress who broke her engagement, in *Lumley v. Gye*, 2 E. & B. 216, could have performed, if she liked. That is the case of tenants leaving their holdings on account of threats, which is put in 1 Rolle's Abridgment, 108; Action sur Case, (N.) pl. 21.

Many other examples could be given where the law allows a remedy, though the wrongful act requires the concurrence of another person's will. The rule is the same as to crimes. The law does not excuse instigation to crime because the other person need not commit the crime, or for the reason that it is impossible to separate the effect of the instigation and natural pravity of will, which was the ground erroneously assigned by Coleridge, J., for his opinion in *Lumley v. Gye*, 2 E. & B. 216. In fact the law makes no distinction between moral and physical agency, or the degrees of the influence, when the cause is attached to the consequence by the verdict of the jury.

The law of conspiracy, which is traced down, in Comyn's Digest, and after him in the notes to Saunders' Reports, and in several English judgments as well as in the judgment in *Kearney v. Lloyd*, 26 L. R. Ir. 268, from the obsolete writ of conspiracy, through the action on the case in the nature of conspiracy, with their several distinctions, and which was originally confined to false accusations of crime, has widened out by the expansion of social conditions and the increase of wickedness, until it embraces in its modern extent every kind of wrong committed by several against another, and has been applied in a multitude of instances where the law gives no remedy against an individual, which was the utmost that was determined by *Allen v. Flood*, (1898) A. C. 1.

... a malicious design to deprive a person of his livelihood, the malice being compounded both of the object, and the want of any just motive of personal right. For no one contended at any time that the object of drawing all persons into the pen of a trade union, was a ground of privilege like that which excused the act in *The Mogul Steamship Co. v. M'Gregor*, (1892) A. C. 25, where the defendants merely waged a war of rivalry in their trade. However, if "civil wrong" be understood in the sense of actionable wrong, the

rule, so confined, is contrary to a multitude of cases, in which the action was adopted, and in which nevertheless it is most certain there was no legal remedy against a single defendant, even before the decision of *Allen v. Flood*, (1898) A. C. 1. Indeed, that is the express and special use of the action of conspiracy, without which it would find no real place in practice, though it is not impossible such an action could be maintained for what is actionable also in the case of an individual.

There was in this case a direct design to injure the plaintiff. That was malice alone. The act was not done in exercise of any right the defendants possessed. It was done through the agency of another person by improperly influencing his will; and that will was moved solely by their act, and would not otherwise have been exercised. It was done by numbers, to which the law attaches a new and altered quality of more formidable wrong — the foundation of conspiracy — which is a difference in things themselves that can never be taken out of the law, civil or criminal, whilst there is a difference between a man and an army. Lastly, there was the damage which was so unjust as itself to make the act malicious.

For the case put, of a person maliciously digging on his own land, and draining the well of his neighbour, is no exception, and demonstrates the weakness of the argument which is founded on it. In that case the act could not be prohibited without interfering with the inherent right of property; and the right of the neighbour was subject to the right of the contiguous owner. The two rights were equal. The right absorbed the malice, and could not otherwise co-exist with it. Here the defendants possessed no right which they could not otherwise exercise; and the right of the plaintiff to carry on his trade was not subject to any right in them. No right of interference with others, which the law could recognize, could attach to the aggressions of a trade union — to their plans for the revision of the relations between employers and employed — to proceedings conducting, by inevitable sequence, to what was lately expressed, with no less energy than the weight attaching to the author, as “the destructive demands of a class upon the fundamental laws on which civil order rests.”

SIR P. O'BRIEN, L. C. J., and ANDREWS, J., delivered opinions in favor of denying defendants' motion.

PALLES, C. B., dissented, because he felt himself “coerced by the judgment of the House of Lords in *Allen v. Flood*. . . .”

The defendants' motion was refused with costs.

The case was then carried to the Irish Court of Appeal. In accordance with the opinions there delivered by LORD ASHBOURNE, CHAN-

CELLOR, PORTER, M. R., WALKER, L. J., and HOLMES, L. J., the decision below, as to the verdict and judgment for £200, was affirmed with costs; the judgment for the plaintiff being amended by omitting the part as to the recovery of £50 damages which was separately assessed on account of the "black list."

HOLMES, L. J., said: "The 'black list' was only an overt act of the conspiracy, and the sum awarded for it is included in the £200."

One of the defendants, Quinn, appealed to the House of Lords.

W. Martin McGrath and *Vesey Knox*, for appellant.

Haldane, K. C., and *Francis Watt*, for respondent.

[Arguments omitted.]

LORD CHANCELLOR HALSBURY, LORDS MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY delivered opinions in favor of dismissing the appeal.

EARL OF HALSBURY, L. C.

[As to the effect of the decision in *Allen v. Flood*.]

Now the hypothesis of fact upon which *Allen v. Flood* was decided by a majority in this House was that the defendant there neither uttered nor carried into effect any threat at all: he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men, which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favor of his fellow-members. It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision.

LORD MACNAGHTEN.

I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys.

What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leatham, and so enable them to wreak their vengeance on Leatham's servants who were not members of the union.

LORD LINDLEY.¹ My Lords, the case of *Allen v. Flood*, [1898] A. C. 1, has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs.² The action was tried before Kennedy, J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs.³ There being no question of conspiracy, intimidation, coercion, or breach of contract, for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

¹ Read by Lord Davey in Lord Lindley's absence.

² [1895] 2 Q. B. 22, 23; [1898] A. C. 2.

³ [1898] A. C. p. 19, Lord Watson; p. 115, Lord Herschell; pp. 147-150, Lord Macnaghten; pp. 161, 165, Lord Shand; p. 175, Lord Davey; p. 178, Lord James.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen v. Flood*, (1898) A. C. 1; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen v. Flood*, (1898) A. C. 1, criminal responsibility had not to be considered. It would revolutionize criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i. e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1) what the plaintiff's rights were; (2), what the defendants' conduct was; (3), whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalizes strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with

him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact — in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified — the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen, L. J., in his admirable judgment in the *Mogul Steamship Company's Case*, 23 Q. B. D. 613, 614, may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood*, (1898) A. C. 1, to be opposed to it.

If the above reasoning is correct, *Lumley v. Gye*, 2 E. & B. 216, was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell*, (1893) 1 Q. B. 715, ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood*, (1898) A. C. 1, and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood*, (1898) A. C. 1. But in *Temperton v. Russell*, (1893) 1 Q. B. 715, there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants

threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*, (1898) A. C. 1. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff — not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co. v. MacGregor*, (1892) A. C. 25, and *Allen v. Flood*, (1898) A. C. 1, and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood*, (1898) A. C. 1, in favour of the appellant. His sheet anchor is *Allen v. Flood*, (1898) A. C. 1, which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had

been done by one person only, his conduct would not have been actionable, and that the fact that what was done was affected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood*, (1898) A. C. 1, Lord Herschell, (1898) A. C. at pp. 128, 138, expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike, and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood*, (1898) A. C. 1, there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst

the American cases, I would refer especially to *Vegetahn v. Guntner*, 167 Mass. 92, where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.*, (1892) A. C. 25; 23 Q. B. D. 598, that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen v. Flood*, (1898) A. C. 1, emphasizes the same doctrine. The principle was strikingly illustrated in the *Scottish Coöperative Society v. Glasgow Fleshers' Association*, 35 Sc. L. R. 645, which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs, they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for coöperative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed — no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavored to show.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is *prima facie*, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel

for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

I pass now to consider the effect of the statute 38 & 39 Vict. c. 86.

[The opinion on this point is omitted.]

My Lords, I will detain your Lordships no longer. *Allen v. Flood*, (1898) A. C. 1, is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen v. Flood*, (1898) A. C. 1, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

THE TRADE DISPUTES ACT.

STATUTE OF 6 EDWARD 7: CHAPTER 47.

Enacted Dec. 31, 1906.

AN Act to provide for the regulation of Trades Unions and Trade Disputes.

1.—The following paragraph shall be added as a new paragraph after the first paragraph of section three of the Conspiracy and Protection of Property Act, 1875:—

“An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable.”

2. — (1) It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working.

(2) Section seven of the Conspiracy and Protection of Property Act, 1875, is hereby repealed from “attending at or near” to the end of the section.

3.—An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills.

4.—(1) An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court.

(2) Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute.

5.—(1) This Act may be cited as the Trade Disputes Act, 1906, and the Trade Union Acts, 1871 and 1876, and this Act may be cited together as the Trade Union Acts, 1871 to 1906.

(2) In this Act the expression "trade union" has the same meaning as in the Trade Union Acts, 1871 and 1876, and shall include any combination as therein defined, notwithstanding that such combination may be the branch of a trade union.

(3) In this Act and in the Conspiracy and Protection of Property Act, 1875, the expression "trade dispute" means any dispute between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment, or with the conditions of labor, of any person, and the expression "workmen" means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises; and, in section three of the last-mentioned Act, the words "between employers and workmen" shall be repealed.¹

PICKETT v. WALSH.

1906. 192 *Massachusetts*, 573.

[The following condensed statement is taken from 20 *Harvard Law Review*, 445-447.]

THE plaintiffs were brick and stone "pointers." The defendants were officers and members of bricklayers' unions and stonemasons' unions.

One ground of complaint was that the defendants prevented the employment of the plaintiffs as "pointers" by notifying contractors that they would not lay the bricks or do the mason work on any building unless they were also employed to do the pointing of the brick and stone masonry. "The defendants in effect say we want the work of pointing the brick and stone laid by us, and you must

¹ For some English criticisms of this legislation, see 20 *Harvard Law Review*, p. 351, note 3.

give us all or none of the work.”¹ The court held that this conduct, although disastrous to the plaintiffs and damaging to the building contractors, was justifiable. “. . . it was within the rights of these unions to compete for the work of doing the pointing, and, in the exercise of their right of competition, to refuse to lay bricks and set stone unless they were given the work of pointing them when laid.”²

The other ground of action in *Pickett v. Walsh* was quite distinct from the foregoing. The firm of L. P. Soule & Son Company were the general contractors for the erection of the Ford building; but they had nothing to do with the employment of “pointers.” The pointing of that building was being done under a contract between the owners of the building and Pickett, a pointer who was one of the plaintiffs. Other buildings were being erected for other owners, on which the Soule Company were the general contractors, and as to which no complaint existed in reference to the pointing. The brick-laying and masonry on these other buildings were being done by members of the defendants’ union. The defendant officials induced all the bricklayers and masons to quit working for the Soule Company on these other buildings, because that company “was doing work on another building [the Ford building] in which work was being done by pointers, employed not by the L. P. Soule & Son Company but [by] the owners of the building.” The evident purpose was to thus induce the Soule Company to exert pressure on the owners of the Ford building to discontinue the employment of the pointers (*Pickett et als.*). The court held that this conduct was not justifiable. The decision is not based on the ground that the defendants were intentionally inducing, or attempting to induce, a breach of contract; but on the broad ground that the forcing a neutral third person to exert a pressure on the plaintiffs’ employer was not a lawful means of competition.

LORING, J., said, pp. 587-588:—

“That strike has an element in it like that in a sympathetic strike, in a boycott, and in a blacklisting, namely: It is a refusal to work for A, with whom the strikers have no dispute, for the purpose of forcing A to force B to yield to the strikers’ demands. In the case at bar the strike on the L. P. Soule & Son Company was a strike on that contractor to force it to force the owner of the Ford building to give the work of pointing to the defendant unions. That passes beyond a case of competition where the owner of the Ford building is left to choose between the two competitors. Such a strike is in effect compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford building. It is a combination by the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant union’s) favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as

¹ Loring, J., p. 583.

² *Ibid.*

they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of the opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the strikers' demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

[Without going through all the American decisions tending in the same direction as the Mogul and Glasgow cases,¹ we may take as a typical case *Bohn Mfg. Co. v. Hollia*.² "A large number of retail lumber dealers formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers not dealers, at any point where a member of the association was carrying on a retail yard; and they provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, the secretary should notify all the members of the fact. The plaintiff, a wholesaler, having made such a sale directly to a consumer, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association."³ The court refused to grant an injunction against sending out the notice. Here the retail dealers did not threaten to cease dealing with any one except their competitors, *i. e.*, wholesale dealers who should attempt to sell directly to consumers. They used no lever but their own conduct. They did not threaten to induce outsiders to refrain from working for, or selling goods to, the wholesalers. And even as to their own conduct, they did not threaten to abstain from dealings with wholesalers in all matters, but only in the purchase of lumber. Much less did they threaten to abstain from dealing with persons who dealt with the wholesalers. In a subsequent Minnesota case *Start, J.*, said:⁴ —

"It is to be noted that the defendants in the Bohn case had similar legitimate interests to protect which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers; and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealers."]

¹ As previously intimated, there are some American authorities *contra* to the principle of the Glasgow case, and inconsistent with some of the reasoning in the Mogul case. See, for instance, *Jackson v. Stanfield*, 137 Ind. 592; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 439; and other cases collected by Professor Wyman, 17 Green Bag, 210, 223.

² 54 Minn. 223.

³ This statement is copied from 17 Green Bag, 218. See also statement by Professor Lewis, 44 Am. L. Reg. (N. S.) 469.

⁴ *Ertz v. Produce Exchange Co.*, 79 Minn. 140, 144.

PLANT ET ALS. v. WOODS ET ALS.

1900. 176 *Massachusetts*, 492.

BILL IN EQUITY filed in the Superior Court, by the officers and members "of the voluntary association known as Union 257, Painters and Decorators of America of Springfield, Massachusetts, which Union is affiliated with a national organization of the same name, with headquarters at Lafayette in the State of Indiana," against the officers and members "of the voluntary association known as Union 257, Painters and Decorators of America, which Union is affiliated with a national organization of the same name, with headquarters at Baltimore in the State of Maryland," to restrain the defendants from any acts or the use of any methods tending to prevent the members of the plaintiff association from securing employment or continuing in their employment. Hearing before Dewey, J., who entered the following decree:

"The cause came on to be heard, and was argued by counsel; and thereupon, on consideration thereof, it is ordered adjudged and decreed that the defendant association, the defendants, and each and every of them, their committees, agents, and servants, be restrained and strictly enjoined from interfering and from combining, conspiring, or attempting to interfere, with the employment of members of the plaintiffs' said association, by representing or causing to be represented in express or implied terms to any employer of said members of plaintiffs' association, or to any person or persons or corporation who might become employers of any of the plaintiffs, that such employers will suffer or are likely to suffer some loss or trouble in their business for employing or continuing to employ said members of plaintiffs' said association; or by representing, directly or indirectly, for the purpose of interfering with the employment of members of the plaintiffs' said association, to any who have contracts or may have contracts for services to be performed by employers of members of plaintiffs' said association that such persons will or are likely to suffer some loss or trouble in their business for allowing such employers of members of plaintiffs' said association (and because they are such employers) to obtain or perform such contracts; or by intimidating, or attempting to intimidate, by threats, direct or indirect, express or implied, of loss or trouble in business, or otherwise, any person or persons or corporation who now are employing or may hereafter employ or desire to employ any of the members of the plaintiffs' said association; or by attempting by any scheme or conspiracy, among themselves or with others, to annoy, hinder, or interfere with, or prevent any person or persons or corporation from employing or continuing to employ a member or members of plaintiffs' said association; or by causing, or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said

association (because he is such employer) in giving or allowing the performance of contracts to or by such employer; and from any and all acts, or the use of any methods, which by putting or attempting to put any person or persons or corporation in fear of loss or trouble, will tend to hinder, impede, or obstruct members, or any member, of the plaintiffs' said association from securing employment or continuing in employment. And that the plaintiffs recover their costs, taxed as in an action of law."

The case was reported, at the request of both parties, for the determination of this court. The facts appear in the opinion.

W. R. Heady (J. W. Flannery with him), for the plaintiffs.

W. H. McClintock (J. B. Carroll with him), for the defendants.

HAMMOND, J. This case arises out of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them is that the plaintiff union is affiliated with a national organization having its headquarters in Lafayette in the State of Indiana, while the defendant union is affiliated with a similar organization having its headquarters in Baltimore in the State of Maryland. The plaintiff union was composed of workmen who in 1897 withdrew from the defendant union.

There does not appear to be anything illegal in the object of either union as expressed in its constitution and by-laws. The defendant union is also represented by delegates in the Central Labor Union, which is an organization composed of five delegates from each trade union in the city of Springfield, and had in its constitution a provision for levying a boycott upon a complaint made by any union.

The case is before us upon a report after a final decree in favor of the plaintiffs, based upon the findings stated in the report of the master.

The contest became active early in the fall of 1898. In September of that year, the members of the defendant union declared "all painters not affiliated with the Baltimore headquarters to be non-union men," and voted to "notify the bosses" of that declaration. The manifest object of the defendants was to have all the members of the craft subjected to the rules and discipline of their particular union, in order that they might have better control over the whole business, and to that end they combined and conspired to get the plaintiffs and each of them to join the defendant association, peaceably if possible but by threat and intimidation if necessary. Accordingly, on October 7, they voted that "if our demands are not complied with, all men working in shops where Lafayette people are employed refuse to go to work." The plaintiffs resisting whatever persuasive measures, if any, were used by the defendants, the latter proceeded to carry out their plan in the manner fully set forth in the master's report. Without rehearsing the circumstances in detail it is sufficient to say here that the general method of operations was substantially as follows:—

A duly authorized agent of the defendants would visit a shop where one or more of the plaintiffs were at work and inform the employer of the action of the defendant union with reference to the plaintiffs, and ask him to induce such of the plaintiffs as were in his employ to sign applications for reinstatement in the defendant union. As to the general nature of these interviews the master finds that the defendants have been courteous in manner, have made no threats of personal violence, have referred to the plaintiffs as non-union men, but have not otherwise represented them as men lacking good standing in their craft; that they have not asked that the Lafayette men be discharged, and in some cases have expressly stated that they did not wish to have them discharged, but only that they sign the blanks for reinstatement in the defendant union. The master, however, further finds, from all the circumstances under which those requests were made, that the defendants intended that employers of Lafayette men should fear trouble in their business if they continued to employ such men, and that employers to whom these requests were made were justified in believing that a failure on the part of their employees who were Lafayette men to sign such reinstatement blanks, and a failure on the part of the employers to discharge them for not doing so, would lead to trouble in the business of the employers in the nature of strikes or a boycott, and the employers to whom these requests were made did believe that such results would follow, and did suggest their belief to the defendants, and the defendants did not deny that such results might occur; that the strikes which did occur appear to have been steps taken by the defendants to obtain the discharge of such employees as were Lafayette men who declined to sign application blanks for reinstatement; that these defendants did not in all cases threaten a boycott of the employers' business, but did threaten that the place of business of at least one such employer would be left off from a so-called "fair list" to be published by the Baltimore Union. The master also found that, from all the evidence presented, the object which the Baltimore men and the defendant association sought to accomplish in all the acts which were testified to was to compel the members of the Lafayette Union to join the Baltimore Union, and as a means to this end they caused strikes to be instituted in the shops where strikes would seriously interfere with the business of the shops, and in all other shops they made such representations as would lead the proprietors thereof to expect trouble in their business.

We have, therefore, a case where the defendants have conspired to compel the members of the plaintiff union to join the defendant union, and to carry out their purpose have resolved upon such coercion and intimidation as naturally may be caused by threats of loss of property by strikes and boycotts, to induce the employers either to get the plaintiffs to ask for reinstatement in the defendant union, or, that failing, then to discharge them. It matters not that this request to discharge has not been expressly made. There can be no doubt, upon the find-

ings of the master and the facts stated in his report, that the compulsory discharge of the plaintiffs in case of non-compliance with the demands of the defendant union is one of the prominent features of the plan agreed upon.

It is well to see what is the meaning of this threat to strike, when taken in connection with the intimation that the employer may "expect trouble in his business." It means more than that the strikers will cease to work. That is only the preliminary skirmish. It means that those who have ceased to work will, by strong, persistent, and organized persuasion and social pressure of every description, do all they can to prevent the employer from procuring workmen to take their places. It means much more. It means that, if these peaceful measures fail, the employer may reasonably expect that unlawful physical injury may be done to his property; that attempts in all the ways practised by organized labor will be made to injure him in his business, even to his ruin, if possible; and that, by the use of vile and opprobrious epithets and other annoying conduct, and actual and threatened personal violence, attempts will be made to intimidate those who enter or desire to enter his employ; and that whether or not all this be done by the strikers or only by their sympathizers, or with the open sanction and approval of the former, he will have no help from them in his efforts to protect himself.

However mild the language or suave the manner in which the threat to strike is made under such circumstances as are disclosed in this case, the employer knows that he is in danger of passing through such an ordeal as that above described, and those who make the threat know that as well as he does. Even if the intent of the strikers, so far as respects their own conduct and influence, be to discountenance all actual or threatened injury to person or property or business, except that which is the direct necessary result of the interruption of the work, and even if their connection with the injurious and violent conduct of the turbulent among them or of their sympathizers be not such as to make them liable criminally or even answerable civilly in damages to those who suffer, still with full knowledge of what is to be expected they give the signal, and in so doing must be held to avail themselves of the degree of fear and dread which the knowledge of such consequences will cause in the mind of those — whether their employer or fellow workmen — against whom the strike is directed; and the measure of coercion and intimidation imposed upon those against whom the strike is threatened or directed is not fully realized until all those probable consequences are considered.

Such is the nature of the threat, and such the degree of coercion and intimidation involved in it.

If the defendants can lawfully perform the acts complained of in the city of Springfield, they can pursue the plaintiffs all over the State in the same manner, and compel them to abandon their trade or bow to the behests of their pursuers.

It is to be observed that this is not a case between the employer and employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this, as in every other case of equal rights, the right of each individual is to be exercised with due regard to the similar right of all others, and the right of one be said to end where that of another begins.

The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection. Sir William Erle in his book on Trade Unions, page 12, has stated this in the following language, which has been several times quoted with approval by judges in England: "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labor or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description—done, not in the exercise of the actor's own right, but for the purpose of obstruction—would if damage should be caused thereby to the party obstructed, be a violation of this prohibition."

The same rule is stated with care and discrimination by Wells, J., in *Walker v. Cronin*, 107 Mass. 555, 564: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In this case the acts complained of were calculated to cause damage to the plaintiffs, and did actually cause such damage; and they were intentionally done for that purpose. Unless, therefore, there was justifiable cause, the acts were malicious and unlawful. *Walker v. Cronin*, *ubi supra*, *Carew v. Rutherford*, 106 Mass. 1, and cases cited therein.

The defendants contend that they have done nothing unlawful, and, in support of that contention, they say that a person may work for whom he pleases; and, in the absence of any contract to the contrary, may cease to work when he pleases, and for any reason whatever, whether the same be good or bad; that he may give notice of his intention in advance, with or without stating the reason; that what one man may do several men acting in concert may do, and may

agree beforehand that they will do, and may give notice of the agreement; and that all this may be lawfully done notwithstanding such concerted action may, by reason of the consequent interruption of the work, result in great loss to the employer and his other employees, and that such a result was intended. In a general sense, and without reference to exceptions arising out of conflicting public and private interests, all this may be true.

It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first head-note in *Allen v. Flood*, as reported in [1898] A. C. 1, as follows: "An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action." If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive; or that an act lawful under one set of circumstances is therefore lawful under every conceivable set of circumstances, the proposition does not commend itself to us as either logically or legally accurate.

In so far as a right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor, as where one digs upon his own land for water (*Greenleaf v. Francis*, 18 Pick. 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra v. Bourges*, 141 Mass. 7), but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined.

This principle is of very general application in criminal law, and also is illustrated in many branches of the civil law, as in cases of libel and of procuring a wife to leave her husband. *Tasker v. Stanley*, 153 Mass. 148, and cases therein cited. Indeed the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See on this an instructive article in 8 *Harvard Law Review*, 1, where the subject is considered at some length.

It is manifest that not much progress is made by such general statements as those quoted above from *Allen v. Flood*, whatever may be their meaning.

Still standing for solution is the question, Under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent?

In cases somewhat akin to the one at bar this court has had occa-

sion to consider the question how far acts, manifestly coercive and intimidating in their nature, which cause damage and injury to the business or property of another, and are done with intent to cause such injury and partly in reliance upon such coercion, are justifiable.

In *Bowen v. Matheson*, 14 Allen, 499, it was held to be lawful for persons engaged in the business of shipping seamen to combine together into a society for the purpose of competing with other persons engaged in the same business, and it was held lawful for them, in pursuance of that purpose, to take men out of a ship, if men shipped by a non-member were in that ship; to refuse to furnish seamen through a non-member; to notify the public that they had combined against non-members, and had "laid the plaintiff on the shelf"; to notify the plaintiff's customers and friends that the plaintiff could not ship seamen for them; and to interfere in all these ways with the business of the plaintiff as a shipping agent, and compel him to abandon the same. The justification for these acts, so injurious to the business of the plaintiff and so intimidating in their nature, is to be found in the law of competition. No legal right of the plaintiff was infringed upon, and, as stated by Chapman, J., in giving the opinion of the court (p. 503), "if their effect is to destroy the business of shipping-masters who are not members of the association, it is such a result as in the competition of business often follows from a course of proceeding that the law permits." The primary object of the defendants was to build up their own business, and this they might lawfully do to the extent disclosed in that case, even to the injury of their rivals.

Similar decisions have been made in other courts where acts somewhat coercive in their nature and effect have been held justifiable under the law of competition. *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25, *Bohn Manuf. Co. v. Hollis*, 54 Minn. 223; *Macaulay v. Tierney*, 19 R. I. 255.

On the other hand, it was held in *Carew v. Rutherford*, 106 Mass. 1, that a conspiracy against a mechanic, — who is under the necessity of employing workmen in order to carry on his business, — to obtain a sum of money from him which he is under no legal obligation to pay, by inducing his workmen to leave him or by deterring others from entering into his employ, or by threatening to do this so that he is induced to pay the money demanded, under a reasonable apprehension that he cannot carry on his business without yielding to the demands, is an illegal, if not a criminal conspiracy; that the acts done under it are illegal, and that the money thus obtained may be recovered back. Chapman, C. J., speaking for the court, says that there is no doubt that, if the parties under such circumstances succeed in injuring the business of the mechanic, they are liable to pay all the damages done to him.

That case bears a close analogy to the one at bar. The acts there threatened were like those in this case, and the purpose was, in sub-

stance, to force the plaintiff to give his work to the defendants, and to extort from him a fine because he had given some of his work to other persons.

Without now indicating to what extent workmen may combine and in pursuance of an agreement may act by means of strikes and boycotts to get the hours of labor reduced or their wages increased, or to procure from their employers any other concession directly and immediately affecting their own interests, or to help themselves in competition with their fellow-workmen, we think this case must be governed by the principles laid down in *Carew v. Rutherford*, *ubi supra*. The purpose of these defendants was to force the plaintiffs to join the defendant association, and to that end they injured the plaintiffs in their business, and molested and disturbed them in their efforts to work at their trade. It is true they committed no acts of personal violence, or of physical injury to property, although they threatened to do something which might reasonably be expected to lead to such results. In their threat, however, there was plainly that which was coercive in its effect upon the will. It is not necessary that the liberty of the body should be restrained. Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this. As stated by Lord Bramwell in *Regina v. Drutt*, 10 Cox C. C. 592, 600, "No right of property, or capital, . . . was so sacred, or so carefully guarded by the law of this land, as that of personal liberty. . . . That liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body."

It was not the intention of the defendants to give fairly to the employer the option to employ them or the plaintiffs, but to compel the latter against their will to join the association, and to that end to molest and interfere with them in their efforts to procure work by acts and threats well calculated by their coercive and intimidating nature to overcome the will.

The defendants might make such lawful rules as they please for the regulation of their own conduct, but they had no right to force other persons to join them.

The necessity that the plaintiffs should join this association is not so great, nor is its relation to the rights of the defendants, as compared with the right of the plaintiffs to be free from molestation, such as to bring the acts of the defendants under the shelter of the principles of trade competition. Such acts are without justification, and therefore are malicious and unlawful, and the conspiracy thus to force the plaintiffs was unlawful. Such conduct is intolerable, and inconsistent with the spirit of our laws.

The language used by this court in *Carew v. Rutherford*, 106 Mass.

1, 15, may be repeated here with emphasis, as applicable to this case: "The acts alleged and proved in this case are peculiarly offensive to the free principles which prevail in this country; and if such practices could enjoy impunity, they would tend to establish a tyranny of irresponsible persons over labor and mechanical business which would be extremely injurious to both." See, in addition to the authorities above cited, *Commonwealth v. Hunt*, 4 Met. 111; *Sherry v. Perkins*, 147 Mass. 212, 214; *Vegetahn v. Guntner*, 167 Mass. 92, 97; St. 1894, c. 508, § 2;¹ *State v. Donaldson*, 3 Vroom, 151; *State v. Stewart*, 59 Vt. 273; *State v. Glidden*, 55 Conn. 46; *State v. Dyer*, 67 Vt. 690; *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md. 396.

As the plaintiffs have been injured by these acts, and there is reason to believe that the defendants contemplate further proceedings of the same kind which will be likely still more to injure the plaintiffs, a bill in equity lies to enjoin the defendants. *Vegetahn v. Guntner*, *ubi supra*.

Some phases of the labor question have recently been discussed in the very elaborately considered case of *Allen v. Flood*, *ubi supra*. Whether or not the decision made therein is inconsistent with the propositions upon which we base our decision in this case, we are not disposed, in view of the circumstances under which that decision was made, to follow it. We prefer the view expressed by the dissenting judges, which view, it may be remarked, was entertained not only by three of the nine lords who sat in the case, but also by the great majority of the common law judges who had occasion officially to express an opinion.

There must be, therefore, a decree for the plaintiffs. We think, however, that the clause, "or by causing or attempting to cause, any person to discriminate against any employer of members of plaintiffs' said association (because he is such employer) in giving or allowing the performance of contracts to or by such employer," is too broad and indefinite, inasmuch as it might seem to include mere lawful persuasion and other similar and peaceful acts; and for that reason, and also because so far as respects unlawful acts it seems to cover only such acts as are prohibited by other parts of the decree, we think it should be omitted.

Inasmuch as the association of the defendants is not a corporation, an injunction cannot be issued against it as such, but only against its members, their agents and servants.

As thus modified, in the opinion of the majority of the court, the decree should stand.
Decree accordingly.

HOLMES, C. J. When a question has been decided by the court, I think it proper, as a general rule, that a dissenting judge, however

¹ This section is as follows: "No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of any person or corporation."

strong his convictions may be, should thereafter accept the law from the majority and leave the remedy to the Legislature, if that body sees fit to interfere. If the decision in the present case simply had relied upon *Vegelahn v. Guntner*, 167 Mass. 92, I should have hesitated to say anything, although I might have stated that my personal opinion had not been weakened by the substantial agreement with my views to be found in the judgments of the majority of the House of Lords in *Allen v. Flood*, [1898] A. C. 1. But much to my satisfaction, if I may say so, the court has seen fit to adopt the mode of approaching the question which I believe to be the correct one, and to open an issue which otherwise I might have thought closed. The difference between my brethren and me now seems to be a difference of degree, and the line of reasoning followed makes it proper for me to explain where the difference lies.

I agree that the conduct of the defendants is actionable unless justified. *May v. Wood*, 172 Mass. 11, 14, and cases cited. I agree that the presence or absence of justification may depend upon the object of their conduct, that is, upon the motive with which they acted. *Vegelahn v. Guntner*, 167 Mass. 92, 105, 106. I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal. *Weston v. Barnicoat*, 175 Mass. 454. On the other hand, I infer that a majority of my brethren would admit that a boycott or strike intended to raise wages directly might be lawful, if it did not embrace in its scheme or intent violence, breach of contract, or other conduct unlawful on grounds independent of the mere fact that the action of the defendants was combined. A sensible workingman would not contend that the courts should sanction a combination for the purpose of inflicting or threatening violence or the infraction of admitted rights. To come directly to the point, the issue is narrowed to the question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument

in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude always. Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing. It is only by divesting our minds of questions of ownership and other machinery of distribution, and by looking solely at the question of consumption,—asking ourselves what is the annual product, who consumes it, and what changes would or could we make,—that we can keep in the world of realities. But, subject to the qualifications which I have expressed, I think it lawful for a body of workmen to try by combination to get more than they now are getting, although they do it at the expense of their fellows, and to that end to strengthen their union by the boycott and the strike.

MARTELL v. WHITE ET AL.

March 2, 1904. *Supreme Court of Massachusetts.*

TORT for alleged conspiracy to injure plaintiff's business. In the Superior Court, Bishop, J., ordered a verdict for defendants, and plaintiff excepted

Chas. W. Bartlett and *Elbridge R. Anderson* for plaintiff.

Jas. E. Cotter and *Jas. W. McAnarney* for defendants.

HAMMOND, J. The evidence warranted the finding of the following facts, many of which were not in dispute. The plaintiff was engaged in a profitable business in quarrying granite and selling the same to granite workers in Quincy and vicinity. About January, 1899, his customers left him, and his business was ruined through the action of the defendants and their associates.

The defendants were all members of a voluntary association known as the Granite Manufacturers' Association of Quincy, Mass., and some of them were on the executive committee. The association was composed of "such individuals, firms, or corporations as are, or are about to become manufacturers, quarriers, or polishers of granite." There was no constitution, and, while there were by-laws, still, except as hereinafter stated, there was in them no statement of the objects for which the association was formed. The by-laws provided among other things for the admission, suspension and expulsion of members, the election of officers, including an executive committee, and defined the respective powers and duties of the officers. One of the by-laws read as follows: "For the purpose of defraying in part the expense of the maintenance of this organization, any member thereof having business transactions with any party or concern in Quincy or its vicinity, not members hereof, and in any way relating to the cutting, quarrying, polishing, buying or selling of granite (hand polishers excepted), shall for each of said transactions contribute at least \$1 and not more than \$500. The amount to be fixed by the association upon its determining the amount and nature of said transaction."

Acting under the by-laws, the association investigated charges which were made against several of its members that they had purchased granite from a party "not a member" of the association. The charges were proved, and under the section above quoted it was voted that the offending parties "should respectively contribute to the funds of the association" the sums named in the votes. These sums ranged from \$10 to \$100. Only the contribution of \$100 has been paid, but it is a fair inference that the proceedings to collect the others have been delayed only by reason of this suit. The party "not a member" was the present plaintiff, and the members of the association knew it. Most of the customers of the plaintiff were members of the association, and after these proceedings they declined to deal with him.

This action on their part was due to the course of the association in compelling them to contribute as above stated, and to their fear that a similar vote for contribution would be passed should they continue to trade with the plaintiff.

The jury might properly have found also that the euphemistic expression "shall contribute to the funds of the association" contained an idea which could be more tersely and accurately expressed by the phrase "shall pay a fine," or, in other words, that the plain intent of the section was to provide for the imposition upon those who came within its provisions of a penalty in the nature of a substantial fine. The bill of exceptions recites that "there was no evidence of threats or intimidation practiced upon the plaintiff himself, and the acts complained of were confined to the action of the society upon its own members." We understand this statement to mean simply that the acts of the association concerned only such of the plaintiff's customers as were members, and that no pressure was brought to bear upon the plaintiff except such as fairly resulted from action upon his customers. While it is true that the by-law was not directed expressly against the plaintiff by name, still he belonged to the class whose business it was intended to affect, and the proceedings actually taken were based upon transactions with him alone, and in that way were directed against his business alone. It was the intention of the defendants to withdraw his customers from him, if possible, by the imposition of fines upon them, with the knowledge that the result would be a great loss to the plaintiff. The defendants must be presumed to have intended the natural result of their acts.

Here, then, is a clear and deliberate interference with the business of a person with the intention of causing damage to him and ending in that result. The defendants combined and conspired together to ruin the plaintiff in his business, and they accomplished their purpose. In all this have they kept within lawful bounds? It is elemental that the unlawfulness of a conspiracy may be found either in the end sought or the means to be used. If either is unlawful within the meaning of the term as applied to the subject, then the conspiracy is unlawful. It becomes necessary, therefore, to examine into the nature of the conspiracy in this case, both as to the object sought and the means used.

The case presents one phase of a general subject which gravely concerns the interests of the business world and indeed those of all organized society, and which in recent years has demanded and received great consideration in the courts and elsewhere. Much remains to be done to clear the atmosphere, but some things at least appear to have been settled, and certainly at this stage of the judicial inquiry it cannot be necessary to enter upon a course of reasoning or to cite authorities in support of the proposition that while a person must submit to competition he has the right to be protected from malicious interference with his business. The rule is well stated in *Walker v.*

Cronin, 107 Mass. 555, 564, in the following language: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

In a case like this, where the injury is intentionally inflicted, the crucial question is whether there is justifiable cause for the act. If the injury be inflicted without just cause or excuse, then it is actionable. *Bowen, L. J., in Mogul Steamship Co. v. McGregor*, 23 Q. B. D. 598, 613; *Plant v. Woods*, 176 Mass. 492. The justification must be as broad as the act and must cover not only the motive and the purpose, or in other words the object sought, but also the means used.

The defendants contend that both as to object and means they are justified by the law applicable to business competition. In considering this defence it is to be remembered, as was said by *Bowen, L. J., in Mogul Steamship Co. v. McGregor*, L. R. 23 Q. B. D. 598, 611, that there is presented "an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the plaintiff to be protected in the legitimate exercise of his trade and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others." Here, as in most cases where there is a conflict between two important principles, either of which is sound and to be sustained within proper bounds, but each of which must finally yield to some extent to the other, it frequently is not possible by a general formula to mark out the dividing line with reference to every conceivable case, and it is not wise to attempt it. The best and only practicable course is to consider the cases as they arise, and, bearing in mind the grounds upon which the soundness of each principle is supposed to rest, by a process of elimination and comparison to establish points through which at least the line must run and beyond which the party charged with trespass shall not be allowed to go.

While the purpose to injure the plaintiff appears clearly enough, the object or motive is left somewhat obscure upon the evidence. The association had no written constitution, and the by-laws do not expressly set forth its objects. It is true that from the by-laws it appears that none but persons engaged in the granite business can be members, and that a member transacting any business of this kind with a person not a member is liable to a fine; from which it may be inferred that it is the idea of the members that for the protection of their business it would be well to confine it to transactions among

themselves, and that one at least of the objects of the association is to advance the interests of the members in that way. The oral testimony tends to show that one object of the association is to see that agreements made between its members and their employees and between this association and similar associations in the same line of business be kept and "lived up to." Whether this failure to set out fully in writing the objects is due to any reluctance to have them clearly appear or to some other cause, is of course not material to this case. The result, however, is that its objects do not so clearly appear as might be desired; but in view of the conclusion to which we have come as to the means used, it is not necessary to inquire more closely as to the objects. It may be assumed that one of the objects was to enable the members to compete more successfully with others in the same business, and that the acts of which the plaintiff complains were done for the ultimate protection and advancement of their own business interests, with no intention or desire to injure the plaintiff except so far as such injury was the necessary result of measures taken for their own interests. If that was true, then so far as respects the end sought the conspiracy does not seem to have been illegal.

The next question is whether there is anything unlawful or wrongful in the means used as applied to the acts in question. Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case; that the proposition that what one man lawfully can do any number of men acting together by combined agreement lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his own preference and that of an organized and extensive combination may be so great in its effect upon public and private interests as to cease to be simply one of degree and to reach the dignity of a difference in kind. Indeed, in the language of Bowen, L. J., in the *Mogul Steamship* case, *ubi supra*, page 616: "Of the general proposition that certain kinds of conduct not criminal in one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." See also opinion of Stirling, L. J., in *Giblan v. National Amalgamated Laborers' Union*, [1903] 2 K. B. 600, 621. Speaking generally, however,

competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly. Conspicuous illustrations of the destructive extent to which it may be carried are to be found in the *Mogul Steamship* case above cited, and in *Bowen v. Matheson*, 14 Allen, 499. The fact therefore that the plaintiff was vanquished is not enough, provided that the contest was carried on within the rules allowable in such warfare.

It is a right, however, which is to be exercised with reference to the existence of a similar right on the part of others. The trader has not a free lance. He may fight, but as a soldier, not as a guerilla. The right of competition rests upon the doctrine that the interests of the great public are best subserved by permitting the general and natural laws of business to have their full and free operation, and that this end is best attained when the trader is allowed in his business to make free use of these laws. He may praise his wares, may offer more advantageous terms than his rival, may sell at less than cost, or, in the words of Bowen, L. J., in the *Mogul Steamship* case, *ubi supra*, may adopt "the expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to realize a fuller harvest of profit in the future." In these and many other obvious ways he may secure the customers of his rival, and build up his own business to the destruction of that of others, and so long as he keeps within the operation of the laws of trade his justification is complete.

But from the very nature of the case it is manifest that the right of competition furnishes no justification for an act done by the use of means which in their nature are in violation of the principle upon which it rests. The weapons used by the trader who relies upon this right for justification must be those furnished by the laws of trade, or at least must not be inconsistent with their free operation. No man can justify an interference with another man's business through fraud or misrepresentation, nor by intimidation, obstruction or molestation. In the case before us the members of the association were to be held to the policy of refusing to trade with the plaintiff by the imposition of heavy fines, or in other words they were coerced by actual or threatened injury to their property. It is true that one may leave the association if he desires, but if he stays in it he is subjected to the coercive effect of a fine to be determined and enforced by the majority. This method of procedure is arbitrary and artificial, and is based in no respect upon the grounds upon which competition in business is permitted, but on the contrary it creates a motive for business action inconsistent with that freedom of choice out of which springs the benefit of competition to the public, and has no natural or logical relation to the grounds upon which the right to compete is based. Such a method of influencing a person may be coercive and illegal. *Carew v. Rutherford*, 106 Mass. 1.

Nor is the nature of the coercion changed by the fact that the persons fined were members of the association. The words of Munson, J., in *Boutwell v. Marr*, 71 Vt. 1, 9, are applicable here: "The law cannot be compelled by any initial agreement of an associate member to treat him as one having no choice but that of the majority, nor as a willing participant in whatever action may be taken. The voluntary acceptance of by-laws providing for the imposition of coercive fines does not make them legal and collectible, and the standing threat of their imposition may properly be classed with the ordinary threat of suits upon groundless claims. The fact that the relations and processes deemed essential to a recovery are brought within the membership and proceedings of an organized body cannot change the result. The law sees in the membership of an association of this character both the authors of its coercive system and the victim of its unlawful pressure. If this were not so, men could deprive their fellows of established rights, and evade the duty of compensation, simply by working through an association."

In view of the considerations upon which the right of competition is based, we are of opinion that as against the plaintiff the defendants have failed to show that the coercion or intimidation of the plaintiff's customers by means of a fine is justified by the law of competition. The ground of the justification is not broad enough to cover the acts of interference in their entirety, and the interference being injurious and unjustifiable is unlawful.

We do not mean to be understood as saying that a fine is of itself necessarily or even generally an illegal implement. In many cases it is so slight as not to be coercive in its nature; in many it serves a useful purpose to call the attention of a member of an organization to the fact of the infraction of some innocent regulation; and in many it serves as an extra incentive to the performance of some absolute duty or the assertion of some absolute right. But where, as in the case before us, the fine is so large as to amount to moral intimidation or coercion, and is used as a means to enforce a right not absolute in its nature but conditional, and is inconsistent with those conditions upon which the right rests, then the coercion becomes unjustifiable and tainted with illegality the act.

The defendants strongly rely upon *Bowen v. Matheson*, 14 Allen, 499; *Mogul Steamship Co. v. McGregor*, [1892] A. C. 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223; *Macauley Bros. v. Tierney*, 19 R. I. 255, and *Cote v. Murphy*, 159 Penn. St. 420. In none of these cases was there any coercion by means of fines upon those who traded with the plaintiff. Inducements were held out, but they were such as are naturally incident to competition, for instance, more advantageous terms in the way of discounts, increased trade, and otherwise. In the Minnesota case there was among the rules of the association a clause requiring the plaintiff to pay 10 per cent., but the propriety or the legality of that provision was not involved. In *Bowen v. Matheson*, it is true

that the by-laws provided for a fine, but the declaration did not charge that any coercion by means of a fine had been used. A demurrer to the declaration was sustained upon the ground that there was no sufficient allegation of an illegal act. The only allegation which need be noticed here was that the defendants "did prevent men from shipping with" the plaintiff, and as to this the court said: "This might be done in many ways which are legal and proper, and as no illegal methods are stated the allegation is bad." This comes far short of sustaining the defendants in their course of coercion by means of fines. As to the other cases cited by the defendant it may be said that, while bearing upon the general subject of which the present case presents one phase, they are not inconsistent with the conclusion to which we have come. Among the authorities bearing upon the general subject and having some relation to the questions involved in this case, see, in addition to those hereinbefore cited, *Slaughter-House Cases*, 16 Wall. 116; *United States v. Addystone*, 175 U. S. 211; *Doremus v. Hennessy*, 176 Ill. 608; *Inter-Ocean Pub. Co. v. Associated Press*, 184 Ill. 438; *State v. Stewart*, 59 Vt. 273; *Olive v. Van Patten*, 7 Tex. Civ. App. 630; *Barr v. Essex Trades Council*, 53 N. J. Eq. 101; *Jackson v. Stanfield*, 137 Ind. 592; *Bailey v. Master Plumbers*, 103 Tenn. 99; *Brown v. Jacobs Pharmacy Co.*, 115 Ga. 429; *Mogul Steamship Co. v. McGregor*, 15 Q. B. D. 476; s. c. 21 Q. B. D. 544; s. c. 23 Q. B. D. 598; s. c. [1892] A. C. 25.

For the reasons above stated a majority of the court are of opinion that the case should have been submitted to the jury.

*Exceptions sustained.*¹

¹ [But see majority and minority opinions in the later case of *Willcutt & Sons Co. v. Driscoll*, 200 Mass. 110. — Ed.]

BARR v. THE ESSEX TRADES COUNCIL, THE TYPOGRAPHICAL UNION No. 103, OF NEWARK ET ALs.

1894. 53 *New Jersey Equity*, 101.¹¹ Statement abridged. Portions of opinion omitted. — Ed.

ON order to show cause why injunction should not issue.

Anthony Q. Keasbey, for complainant.

Joseph A. Beecher and *Thomas S. Henry*, for defendants.

The original complainant was the sole proprietor and publisher of a daily morning newspaper called the "Newark Times."

The defendants are eighteen bodies, known as "labor unions," embracing many trades in the city of Newark, affiliated in a society or representative body known as "Essex Trades Council."

The Essex Trades Council is a voluntary association, composed of delegates chosen thereto by each of the eighteen defendant unions. Meetings are held weekly. Every organization represented in the council is required to make a monthly report of union purchases, and failing to do so for two consecutive months, its products are not to be considered as "fair."

A circular, issued by the Council in 1893, addressed to the public, states: —

"The Essex Trades Council has for some time past been concentrating the trade of its members and those whom these could influence, upon the goods made and recommended by organized fair labor, and the stores and places where these goods are sold. The regular system of purchase reports from individual consumers, transmitted through their organization, places the council in a position to announce that it is already turning thousands of dollars of trade every week away from those indifferent to the welfare of the worker, and into the pockets of labor's proven friends. That these friends may receive greater support by being made more readily known to organized workingmen and their many sympathizers among lovers of justice, together forming the great bulk of the consuming public, the Essex Trades Council will shortly issue a series of cards for free display in all business establishments especially deserving the patronage of organized fair consumers, their families, associates and friends."

The plan of operation, as developed by the papers and exhibits filed in the cause, is that each individual member of the different unions is required at stated periods to fill out a blank slip furnished for that purpose, stating the amount expended by him in purchase, the character of the articles bought, and the names of the tradesmen with whom he has dealt. These cards, when filled in, are returned by the members to their own union, and by the union reported to the council. A failure by a union to so report for two consecutive months,

places its products under the ban of organized labor as represented in the council. These reports place the trades council in possession of data as to the amount of purchases by the members of the unions, and the tradesmen with whom their dealing is carried on, from which its officers are enabled to estimate, with some degree of accuracy, the volume of purchases by the members of the several organizations within a stated period of time.

The next step is an agreement in writing purporting to be made between the Essex Trades Council and a tradesman, by which the latter, "in return for the patronage of united fair consumers," promises and agrees to buy as consumer, engage as employer, keep as dealer, as exclusively as he can, such labor and goods as may be announced as fair by a particular union and endorsed by the council of consumers of the Essex Trades Council.

Cards are then issued to the tradesmen, under the seal of the trades council, addressed "to all fair consumers," each certifying that the person to whom it is issued "is a fair consuming dealer," and is entitled to their fraternal support until a specified date. Coupons are annexed for certification by particular industries. These cards are of such size, color and appearance that, if publicly displayed in stores or places of business, they will attract attention.

There was issued, under date of March 31, 1894, "by the Essex Trades Council and auxiliary circle bodies," a small pamphlet of convenient size to be carried in the pocket, which is entitled "The Fair List of Newark, N. J.," and to be "for the information of people who buy service or product and who have enterprise enough to seek to place their money where it will do them most good." It contains names and addresses of tradesmen and persons in business, including lawyers, interspersed with items of information and advice.

The plaintiff Barr determined to employ "plate matter" in making up part of his daily paper. (This consists of reading matter edited, set up and stereotyped in New York.) All plaintiff's employees were members of the local typographical union. This union had declared against the use of plate matter in the city of Newark, which fact was known to Mr. Barr. Through his foreman, he sought to have this resolution of the union relaxed in favor of his paper, but on its refusal so to do adhered to his determination, and, by letter dated March 13, 1894, informed his foreman that he would use plate matter on and after March 17th, saying further, that, not desiring to lose any of the men in his department, the union scale of wages would be maintained, and that he would gladly retain the services of such as might be willing to stay. Some of the employees determined to remain, others, however, left in consequence of his disregard of the union's determination, and the union withdrew its endorsement of the newspaper. The union thereupon, through its delegates, informed the Essex Trades Council of this fact and requested its assistance.

In response, the council appointed a committee in reference to the controversy, and, on March 30, 1894, issued a circular addressed to the public, which, after giving its version of the dispute, concludes with this appeal:—

"Friends, one and all, leave this council-boycotting 'Newark Times' alone. Cease buying it! Cease handling it! Cease advertising in it! Keep the money of fair men moving only among fair men. Boycott the boycotter of organized fair labor."

This circular was distributed in the city of Newark.

In April, 1894, the trades council issued a small four-page sheet entitled "The Union Buyer. Official bulletin of united fair custom of Newark and vicinity. Issued by the Essex Trades Council." It is impressed at the heading with the union label. It purports to be volume i., number 1, issued at Newark, N. J., April, 1894. Its first announcement is as follows:—

"Our Mission—To support the supporters and boycott the boycotters of organized fair labor. To promote the public welfare by the diffusion of common cents, urging all to carry these in trade only to those who will return them to the people in the shape of living wages."

The whole paper is devoted to the controversy between the unions and the "Newark Times," no other object being considered. It refers throughout to that paper either by reversing the letters of the name "Times" as "Semit," or by turning the type bottom side up. The first article after the declaration of its mission is a statement from Typographical Union No. 103, under the heading of "'The Times' Trouble." The only grievance stated against the "Times" grows out of the use of plate matter, and ends with "workingmen and advertisers, remember that plate matter means forty-five cents a day, and understand why the 'Newark Times' is an unfair office." Then follow five columns of "Notes and Comments." These are all directed to the controversy, and are in vigorous and denunciatory language, and conclude as follows:—

"In conclusion, the council desires to state that the issue between it and the 'Semit' is now wide open. It is a fight between the 'Semit' and its supporters and the council and its supporters. We give the great public absolute freedom in the choice of its side, but not a single cent of our money will be knowingly let pass to any one who buys the 'Semit,' keeps the 'Semit,' advertises in the 'Semit,' or in any other way leads us to believe that a portion of our honestly-earned money may find its way into the pockets to furnish support to the unfair management of the 'Semit' or any of those who have so foully betrayed the cause of organized fair labor."

At the foot of this document is placed, in large type, the request, "When through reading, please pass to your neighbor."

This paper was circulated in Newark. There were other publications, but the defendants deny any responsibility for them, and there is no evidence to connect them with their issue or circulation.

Various labor unions represented in the trades council then passed a prepared set of resolutions, which were printed and distributed in Newark. One of these requested all enterprising business houses to abstain from advertising in the "Times" until the trouble had been adjusted, stating that hundreds of their friends had refused to buy and read the "Times," and that its circulation had become considerably reduced because of its alleged unfair stand. Another asked such advertisers as had made contracts with the "Times" for definite periods, to consider whether it would not be far more advantageous for them in the end to take out their advertisements, leave their space entirely blank and pay the few cents their contracts called for, than to jeopardize thousands of dollars of trade that fair labor would be "compelled to withhold so long as such advertisements appeared, and for an indefinite period thereafter," adding that "those who now continue to advertise in the 'Times' merely succeed in making themselves conspicuous as persons to carefully and studiously keep away from."

These resolutions found their way into the hands of the advertisers in the "Times."

The various trades unions, affiliated in the council, represent, as is claimed by them, a purchasing power amounting to over \$400,000 in each and every week. Owing to the issue and distribution of the aforesaid circular and resolutions, the individual members of the union, and their friends and sympathizers, withheld their patronage from the "Newark Times." The circulation of the paper was thereby considerably reduced.

The issue and distribution of said circular and resolutions caused certain persons, who had theretofore advertised in the "Times," to cease advertising in that paper.

GREEN, V. C.

[After stating the testimony of Mr. Beckmeyer, secretary of the Essex Trades Council, as to the signification of the word "boycott," as used in the circular and publications.]

From which it is to be gathered that the use of the word "boycott" in the publications, as applied to the "Times," would be regarded by the members of the various unions to mean only that they should refrain from trading or dealing with the complainant, and with those who oppose the organizations in their actions and doings with reference to the complainant.

I do not see that this changes the character of the injury, but even if it does, so far as the members of the organizations are concerned, the difficulty is that these communications were addressed to the public and indiscriminately circulated. They were not intended only for members of the order by whom a technical signification would be given to the word "boycott," but to the general public who would read them and give the word its accepted meaning.

[After quoting various definitions of "boycott"] Mr. Justice Taft, in *Toledo Co. v. Penn. Co.* 54 Fed. Rep. 746, says: "As usually understood a boycott is a combination of many to cause a loss to one person by coercing others against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them."

But the defendants insist, and counsel vigorously urge, that this particular boycott is not open to such adverse criticism, because "there was no violence, intimidation, coercion or threats used, and that everything was done in a peaceful and orderly manner." How far is this claim borne out by the facts? It is true, there was no public disturbance, no physical injury, no direct threats of personal violence or of actual attack on or destruction of tangible property as a means of intimidation or coercion. Force and violence, however, while they may enter largely into the question in a criminal prosecution, are not necessary factors in the right to a civil remedy. But even in criminal law, I do not understand that intimidation, even when a statutory ingredient of crime, necessarily presupposes personal injury or the fear thereof. The clear weight of authority undoubtedly is that a man may be intimidated into doing, or refraining from doing, by fear of loss of business, property or reputation, as well as by dread of loss of life, or injury to health or limb; and the extent of this fear need not be abject, but only such as to overcome his judgment, or induce him not to do, or to do, that which otherwise he would have done or have left undone.

There can be no reasonable dispute that the whole proceeding or boycott in this controversy is to force Mr. Barr, by fear of loss of business, to conduct that business, not according to his own judgment, but in accordance with the determination of the typographical union, and, so far as he is concerned, it is an attempt to intimidate and coerce.

Next as to the members of the various labor unions. According to Mr. Beckmeyer, all the organizations represented in the trades council and the individual members thereof, in strict conformity with the purpose and object for which the said council was organized, withheld their patronage from the said newspaper on the mere announcement by the typographical union to the trades council that that union had withdrawn its endorsement from the "Times." Why? It is said that it was only the exercise by each person of his right to spend his money as his own will dictated. The fallacy of this is apparent. It loses sight of the combination, the whole strength of which lies in the fact that each individual has surrendered his own discretion and will to the direction of the accredited representative of all the organizations. He no longer uses his own judgment, but, by entering into the combination, agrees to be bound by its decree. As is said in *Templeton v. Russell*, *supra*, "those men had bound themselves to obey, and they knew they had done so, and that if they did not obey

they would be fined, or expelled from the union to which they belonged." It is common knowledge, if indeed it does not amply so appear by the papers in this case, that a member of a labor organization who does not submit to the edict of his union asserts his independence of judgment and action at the risk, if not the absolute sacrifice, of all association with his fellow-members. They will not eat, drink, live or work in his company. Branded by the peculiarly offensive epithets adopted, he must exist ostracized, socially and industrially, so far as his former associates are concerned. Freedom of will under such circumstances cannot be expected.

Next as to the advertising public. Tradesmen advertise in newspapers for the sole purpose of drawing customers to their stores. An authoritative announcement, not from one, but from many sources, that the body of organized labor in the city or county representing a purchasing power of \$400,000 a week would cease to deal with those whose advertisements appeared in the newspaper, would have a much more deterrent effect than any threat of violence. To say that this is only advice, or an intimation, to the advertiser for his guidance if he sees fit to accept it, is trifling with the language. Advice, behind which lurks the threat of the withdrawal of such a volume of business, could have no other effect than to intimidate and coerce, as it did in fact make several change their judgment, which had previously led them to advertise in the paper. The claim that this boycott was attempted to be enforced without intimidation or coercion will not bear the light of examination.

A legal excuse for the action of the defendants is next sought in the claim that the Essex Trades Council is a business institution, and that what it has done has been in prosecution of such business, seeking, I suppose, to bring the case within the rule of *Mogul Steamship Co. v. McGregor*, 15 Q. B. Div. 476; 23 Q. B. D. 598. That case proceeded on the doctrine of a lawful competition in business, both parties being engaged in carrying on the same character of business, and the acts complained of having been adopted for the advancement of the defendant's own trade, viz., carrying goods on a steamship line, although thereby damage to the other party necessarily ensued.

I see no similarity in the business of these parties. That of the complainant is the publisher of a newspaper. Members of the typographical union, and stereotypers' and pressmen's union, are skilled workmen, whose services might be employed in such business, but they are not carrying on any enterprise in competition with that of the complainant. So far as the other unions are concerned, the most, if not all of them, have no connection with such trade.

Neither does the claim of the Essex Trades Council, that it is a business institution, stand on any firmer ground. The only element of business which it is engaged in would appear from the facts to be the furnishing to tradesmen of printed cards, certifying that they are proper persons for the members of trades unions to deal with, suitable

to be displayed in conspicuous places in such tradesmen's places of business. This was supplemented by the issue, under date of March 31, 1894, of the small pocket pamphlet entitled "The Fair List of Newark, N. J.," containing the names and addresses of tradesmen and persons in business in Newark, with items of information and advice. Why this is called a business does not appear. It is not stated that any compensation is either required or received by the trades council from the tradespeople for granting or continuing those endorsements, but whether this is so or not, it is in no sense a competing business with the publication of a daily newspaper, and therefore does not come within the principle of the case referred to.

The order to show cause, as far as relates to [eight specified organizations], they having all disclaimed any participation in the acts complained of, must be discharged, with costs. The said order to show cause, so far as relates to the other defendants, must be made absolute, with costs, and an injunction may issue against them, restraining them from distributing or circulating any circulars, printed resolutions, bulletins, or other publications containing appeals or threats against the "Newark Times," or the complainants, its publishers, with the design and tending to interfere with their business in publishing said paper, and from making any threats or using any intimidation to the dealers or advertisers in such newspaper tending to cause them to withdraw their business from such newspaper.

E. G. PIERCE, RESPONDENT, v. THE STABLEMEN'S UNION
LOCAL NO. 8760, ET AL., APPELLANTS.

July 6, 1909. *Supreme Court of California.*¹

HENSHAW, J. The plaintiff went into equity seeking an injunction to restrain the defendants from illegal interference with its business. Plaintiff conducted a livery, board and feed stable in the city and county of San Francisco. The officers and representatives of defendant made request of him to "unionize" his stable by discharging his non-union employees and employing union men in their places. Upon his refusal, a strike of the union men was declared. Following the strike, a boycott was decreed. A patrol about plaintiff's place of business was established, and, under the findings, these representatives of the defendants, the pickets, "called forth in loud, threatening, and menacing tones to the patrons and customers of plaintiffs not to patronize plaintiffs in their said business; defendant, the Stablemen's Union, through its agents and representatives, has stated to and threatened patrons and customers and other persons dealing with

¹ [The opinions are printed from copies furnished by the State Reporter, in advance of publication in the California Reports. — Ed.]

plaintiffs that if said patrons and customers and other persons continued to patronize and do business with plaintiffs, said Stablemen's Union would cause them respectively to be boycotted in their business." Menacing terms and threatening language were made use of by the agents, representatives, and pickets of the union toward the employees of the plaintiff, such as: "Unfair stable; union men locked out and non-union men put in; look at this stable, the only unfair stable on Market Street; the stable that always was and always will be unfair. This is a scab stable. When we catch you outside, we will finish you. We will get you yet. It is a scab stable, full of scabs. We will fix you yet. It is a matter of time when we will get you all right. You will never get out of the stable alive. We will break you in half. We will beat you to death. When we catch you outside, we will finish you." A judgment for an injunction followed upon these findings, and that judgment by its terms commanded the defendant, its agents and employees, to desist and refrain "from in any wise interfering with, or harassing, or annoying, or obstructing plaintiffs in the conduct of the business of their stable, known as the Nevada Stables, and situated at number 1350 Market Street, in the city and county of San Francisco; or from in any wise molesting, interfering with, threatening, intimidating, or harassing any employee or employees of plaintiffs; or from intimidating, harassing, or interfering with any customer or customers, patron or patrons of plaintiffs in connection with the business of plaintiffs, either by boycott or by threats of boycott, or by any other threats; or by any kind of force, violence, or intimidation, or by other unlawful means, seeking to induce any employee or employees of plaintiffs to withdraw from the service of plaintiffs; or by any kind of violence, threats, or intimidation inducing, or seeking to induce, any customer or customers, patron or patrons, of plaintiffs to withdraw their patronage or business from them, or from stationing or placing in front of said plaintiffs' place of business any picket, or pickets, for the purpose of injuring, obstructing, or in any wise interfering with, the business of plaintiffs, or for the purpose of preventing any customer or customers, patron or patrons, of plaintiffs from doing business with them; or from in any other way molesting, intimidating, or coercing, or attempt to molest or intimidate or coerce any customer, patron, or employee of plaintiffs now or hereafter dealing with, or any employee now or hereafter employed by, or working for plaintiffs in their said business."

This appeal is from the judgment. The findings are not attacked. Certain objections to the complaint are presented upon demurrer, and these may be briefly disposed of. The complaint is sufficient to invoke the interposition of a court of equity. It is in this respect similar to the complaint considered in *Goldberg-Bowen Co. v. Stablemen's Union*, 149 Cal. 429. The complaint alleges specific acts calling for preventive relief, and is not confined to mere generalities, as was the case in *Davitt v. American Bakers' Union*, 124 Cal. 99. The fact

that certain of the acts charged amount to crimes or threatened crimes, does not offer reason why equity will refuse to restrain them. While equity will not attempt to restrain the commission of a crime as such, the fact that an act threatening irreparable injury to property rights is of itself criminal, does not deprive a court of equity of its right and power to enjoin its commission. (In re Debs, 158 U. S. 564; Sherry v. Perkins, 144 Mass. 212; Vegelahn v. Guntner, 167 Mass. 92.) In like manner, while equity will not enjoin against a trespass as such, yet when the acts committed and threatened are in the nature of a continuing trespass, working irreparable injury, they will be enjoined. (Boston R. R. v. Sullivan, 177 Mass. 230; Lembeck v. Nye, 47 Ohio, 336.)

Appellants' principal contentions upon the appeal, however, are the following: *First*, that, as the controversy between these parties arises from and over a trade dispute, the court is powerless to grant any injunction under the language of "An act to limit the meaning of the word 'conspiracy' and also the use of restraining orders and injunctions as applied to disputes between employers and employees in the State of California, approved March 20, 1903" (Pen. Code, page 581); *second*, that the boycott is a legal weapon in a trade dispute and, therefore, an injunction should not issue to restrain its use or threatened use; *third*, that "picketing" as an adjunct to the boycott is itself legal and may not be forbidden.

1. As to the first of these contentions, this court had occasion in *Goldberg, etc., Co. v. Stablemen's Union*, 149 Cal. 429, to consider the statute above referred to and relied upon by appellants, and declared that if the construction there contended for (and here contended for) was the proper construction, this provision of the court was void. Not only would it be void as violative of one's constitutional right to acquire, possess, enjoy, and protect property, but as well would it be obnoxious to the constitution in creating arbitrarily and without reason a class above and beyond the law which is applicable to all other individuals and classes. It would legalize a combination in restraint of trade or commerce, entered into by a trades union, which would be illegal if entered into by any other persons or associations. It would exempt trades unions from the operation of the general laws of the land, under circumstances where the same laws would operate against all other individuals, combinations, or associations. It is thus not only special legislation, obnoxious to the constitution (Art. IV, sec. 25, subds. 3 and 33), but it still further violates the constitution in attempting to grant privileges and immunities to certain citizens or classes of citizens which, upon the same terms, have not been granted to all citizens (Art. I, sec. 21).

2. In considering the second proposition, whether or not a court of equity may enjoin a boycott, the meaning of the word is of primary importance. It is defined in 4 Am. & Eng. Enc. of Law, 2d ed., page 85, as follows: "The boycott is a conspiracy, the direct object of

which is to occasion loss to the party or parties against whom the conspiracy is directed, and the means commonly used is the inducing of others to withdraw from such party or parties their patronage and business intercourse by threats that, unless they so withdraw, the members of the combination will cause, directly or indirectly, loss of a similar character to them." Appellants announce their willingness to accept this definition, substituting the word "confederacy" or "combination" for "conspiracy." But the definition, even as so amended, it will be noted is not complete. The "means commonly used" are specified, but other means may be and frequently are employed. A boycott may adopt illegal means and thus become a "conspiracy," a word which imports illegality; or a boycott may employ legal means and methods, and thus be merely a legitimate combination by a number of men to accomplish, within the law, a legal result. The crux of the question and the strain in every case turns, then, upon the means employed. We think that to-day no court would question the right of an organized union of employees, by concerted action, to cease their employment (no contractual obligation standing in the way), and this action constitutes a "strike." We think, moreover, that no court questions the right of those same men to cease dealing by concerted action, either socially or by way of business, with their former employer, and this latter act, in its essence, constitutes the "primary boycott." But what acts organized labor may do, and what means it may adopt to accomplish its end, without violation of the law, have presented questions of much nicety, over which the courts have stood, and still stand, widely divided. It would not be profitable to discuss and analyze these widely divergent cases. It is sufficient to formulate briefly the principles adopted in this state, many of which have recently found elaborate expression in the case of *Parkinson v. Building & Trades Council of Santa Clara*, 36 Cal Dec. 445. The right of united labor to strike, in furtherance of their trade interests (no contractual obligation standing in the way) is fully recognized. The reason for the strike may be based upon the refusal to comply with the employees' demand for the betterment of wages, conditions, hours of labor, the discharge of one employee, the engagement of another — any one of the multifarious ends which in good faith may be believed to tend toward the advancement of the employees. After striking, the employees may engage in a boycott, as that word is here employed. As here employed it means not only the concerted right to the withdrawal of social and business intercourse, but the right by all legitimate means of fair publication, and fair oral or written persuasion, to induce others interested in or sympathetic with their cause, to withdraw their social intercourse and business patronage from the employer. They may go even further than this, and request of another that he withdraw his patronage from the employer, and may use the *moral* intimidation and coercion of threatening a like boycott against him if he refuse so to do. This last proposition necessarily involves the bringing

into a labor dispute between A and B, C who has no difference with either. It contemplates that C, upon the demand of B, and under the moral intimidation lest B boycott him, may thus be constrained to withdraw his patronage from A, with whom he has no controversy. This is the "secondary boycott," the legality of which is vigorously denied by the English courts, the federal courts, and by the courts of many of the states of this nation. Without presenting the authorities, which are multitudinous, suffice it to state the other view in language of the President of the United States but recently uttered: "A body of workmen are dissatisfied with the terms of their employment. They seek to compel their employer to come to their terms by striking. They may legally do so. The loss and inconvenience he suffers he cannot complain of. But when they seek to compel third persons, who have no quarrel with their employer, to withdraw from all association with him by threats that, unless such third persons do so, the workmen will inflict similar injury on such third persons, the combination is oppressive, involves duress, and if injury results, it is actionable." (President Taft, McClure's Magazine, June, 1909, page 204.) Notwithstanding the great dignity which attaches to an utterance such as this, which, as has been said, is but the expression of numerous courts upon the subject-matter, this court, after great deliberation, took what it believed to be the truer and more advanced ground above indicated and fully set forth in *Parkinson v. Building & Trades Council, etc., supra*. In this respect this court recognizes no substantial distinction between the so-called primary and secondary boycott. Each rests upon the right of the union to withdraw its patronage from its employer and to induce by fair means any and all other persons to do the same, and in the exercise of those means, as the unions would have the unquestioned right to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal. However opposed to the weight of federal authority the views of this court are, that they are not unique may be noted by reading *National Protective Association v. Cumming*, 170 N. Y. 315; *Lindsay v. Montana Federation of Labor*, (Mont.) 18 L. R. A. (n. s.) 707, where the highest courts of those states formulate and adopt like principles.

It has been said that it is important to any correct understanding of or adjudication upon such questions that a definition of the word "boycott" should be first stated. Thus, to say that a boycott is a "conspiracy" immediately implies illegality, and puts the conduct of the boycotters under the ban of the law. So also does the definition which describes boycotting as "illegal coercion" designed to accomplish a certain end. As we have undertaken to define boycott, it is an organized effort to persuade or coerce, which may be legal or illegal, according to the means employed. In other jurisdictions where a definition is given to a boycott which imports illegality the injunction

will of course lie against boycotting as such. In this state the injunction will issue, depending upon the circumstances whether the means employed, or threatened to be employed, are legal or illegal.

3. We are thus brought to consider the method of "picketing," the use of which appellants contend is a legal weapon in their hands. So far in this discussion we have dealt exclusively with the respective rights of the employer and of the employee. There are other parties, however, whose rights are entitled to equal consideration, and whose rights always become involved and imperilled when picketing is adopted as a coercive measure in aid of a boycott.

If the strikers have the right, as above indicated, to withdraw patronage themselves and by fair publication, written and oral persuasion to induce others to join in their cause, and finally by threat of like boycott to coerce others into so doing, their rights go no further than this. It is the equal right of the employer to insist before the law that his business shall be subject at the hands of the strikers to no other detriment than that which follows as a consequence of the legal acts of the strikers so above set forth. It is not to be forgotten that when the employees have struck, they occupy no contractual relationship whatsoever to their former employer, and have no right to coerce him or attempt to coerce him by the employment of any other means than those which are equally open to any other individual or association of individuals. No sanctity attaches to a trades union which puts it above the law, or which confers upon it rights not enjoyed by any other individual or association. The two classes of persons to whom we have adverted and whose rights necessarily become involved where a picket or patrol is established, are, first, the rights of those employed or seeking employment in the place of the striking laborers, and, second, the rights of the general public. It is the absolute, unqualified right of every employee, as well as of every other person, to go about his legal business unmolested and unobstructed and free from intimidation, force, or duress. The right of a labor association to strike is no higher than the right of a non-union workman to take employment in place of the strikers. Under the assurance and shield of the Constitution and of the laws, the non-union laborer may go to and from his labor and remain at his place of labor in absolute security from unlawful molestations, and wherever the laws fail to accord such protection, in so far as their execution to be blamed. In this country a man's constitutional liberty means far more than his mere personal freedom. It means that, among other rights, his is the right freely to labor and to own the fruits of his toil. (*Ex parte Jentzsch*, 112 Cal. 468.) Any act of boycotting, therefore, which tends to impair this constitutional right freely to labor, by means passing beyond moral suasion, and playing by intimidation upon the physical fears, is unlawful.

The inconvenience which the public may suffer by reason of a boycott lawfully conducted is in no sense a legal injury. But the public's

rights are invaded the moment the means employed are such as are calculated to and naturally do incite to crowds, riots, and disturbances of the peace.

A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends to and is designed, by physical intimidation, to deter other men from seeking employment in the places vacated by the strikers. It tends, and is designed, to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect; disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. Says Chief Justice Shaw in *Commonwealth v. Hunt*, 4 Met. 111: "The law is not to be hoodwinked by colorable pretences; it looks at truth and reality through whatever disguise it may assume." If it be said that neither threats nor intimidations are used, no man can fail to see that there may be threats, and there may be intimidations, and there may be molesting, and there may be obstructing, without there being any express words used by which a man should show violent threats toward another, or any express intimidation. We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear caused to the employer, to those whom he may have employed or who may seek employment from him, and to the general public. The boycott, having employed these means for this unquestioned purpose, is illegal, and a court will not seek by over-niceties and refinements to legalize the use of this unquestionably illegal instrument. (*Vegelahn v. Guntner*, *supra*; *Crump v. Commonwealth*, 84 Va. 927; *Union Pacific v. Ruef*, 120 Fed. Rep. 124; 18 Ency. of Law, 2d ed., page 85.)

In conclusion, then, and applying these principles to the injunction here under consideration, it appears that, while the injunction was properly granted, it was broader in its terms than the law warrants. It was, for example, too broad in restraining defendants from "in any wise interfering with" plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from "intimidating any customer by boycott or threat of boycott," since, as has been said, the secondary boycott is likewise a legal weapon. In all other respects, however, the injunction was proper.

The trial court is directed to modify its injunction in the particulars

here specified, and in all other respects the judgment will stand affirmed.

We concur: LORIGAN, J.; BRATTY, C. J.; MELVIN, J.

SHAW, J. I agree with all that is said by Justice Henshaw in his opinion, except the part relating to the so-called "secondary boycott" and the attempt to draw a distinction between the compulsion of third persons caused by picketing, and the compulsion of third persons produced by a boycott. My views concerning the "secondary boycott" are expressed in my dissenting opinion in *Parkinson v. Building Trades Council*, (Cal.) 98 Pac. 1040. The means employed for the coercion or intimidation of a third person in a "secondary boycott" are unlawful whenever they are such as are calculated to, and actually do, destroy his free will and cause him to act contrary to his own volition in his own business, to the detriment of the person toward whom the main boycott or strike is directed; in other words, whenever the means used constitute duress, menace, or undue influence. Whether this coercion or compulsion comes from fear of physical violence, as in the case of picketing, or from fear of financial loss, as in the secondary boycott, or from fear of any other infliction, is, in my opinion, immaterial, so long as the fear is sufficiently potent to control the action of those upon whom it is cast. I can see no logical or just reason for the distinction thus sought to be made. There is no such distinction in cases where contracts or wills are declared void, because procured by duress, menace, or undue influence. There should be none where actual injury is produced or threatened through such means acting upon third persons. Nor do I believe any well-considered case authorizes any such distinction. The opinions in the case of *National Protective Association v. Cummings*, 170 N. Y. 315, are devoted to a discussion of the right to strike and the limitations of that right and not to a discussion of the "secondary boycott." A close analysis of the cases on the subject will, as I believe, show that this court stands alone on this point.

For these reasons I do not agree to that part of the judgment directing a modification of the injunction. I believe that it should stand in the form as given by the court below.

ANGELLOTTI, J., and SLOSS, J.

We concur in the judgment. The modification of the judgment is in line with the views announced in the *Parkinson* case. So far as "picketing" is concerned, while we are not prepared to hold that there may not be acts coming within that term as it is accepted and understood in labor disputes, that are entirely lawful and should not be enjoined, we believe that as to such "picketing" as is described in both findings and judgment in this case, the views expressed in the opinion of the court are correct.

¹ For an instructive discussion of the topics covered by this chapter, see Professor Wigmore's *Essays*, "The Boycott as Ground for Damages," 21 Am. L. Rev. 500, and "Interference with Social Relations," 21 Am. L. Rev. 764. — Ed.

SECTION II. (*continued*).

(d) BY MAINTENANCE.

HARRIS v. BRISCO.

IN THE COURT OF APPEAL, JUNE 11, 1886.

[*Reported in Law Reports, 17 Queen's Bench Division, 504.*]

FRY, L. J., delivered the judgment of the court (Lord Esher, M. R., and Bowen and Fry, L. JJ.) as follows: ¹—

This is an appeal from a judgment of Wills, J., by which the plaintiff recovered from the defendant Brisco a sum of £118, and costs.

The action was one for maintenance, and the short facts are these:

One William Nailer and his brother Charles Nailer were owners in fee in equal moieties of a small farm. This had been mortgaged for £1,000. Charles Nailer sold to the plaintiff Harris his equity of redemption in his moiety for £25. William Nailer obtained advances from Harris. Harris took an assignment of the mortgage for £1,000, and subsequently purchased from William Nailer his equity of redemption in his moiety for £40. Harris allowed William Nailer for a time to occupy the farm, and then turned him out. Nailer considered himself aggrieved, and brought an action in the Chancery Division against Harris for the redemption of the farm. In this action Nailer was aided and abetted by Brisco. Harris set up the assignment of the equity of redemption, and thereupon Nailer by amendment denied that he had executed any conveyance of his equity of redemption, and alleged that, if he had executed any such conveyance, his execution was procured by fraud. This action was tried before Kay, J., when the plaintiff Nailer entirely failed, and his action was dismissed, with costs to be paid by Nailer. Harris's costs were taxed at the sum of £118 0s. 4d., which sum, Nailer being a pauper, has never been paid. Harris has brought the present action to recover this sum of £118 0s. 4d., together with £5 for personal costs, from Brisco, as having maintained Nailer in his redemption action. Wills, J., has held that the plaintiff has proved his case, and from his judgment the defendant Brisco has appealed.

On this appeal many points have been urged.

The defendant's counsel have, in the first place, contended that no such action will lie. On principle this contention appears untenable, for maintenance is an unlawful act, and, when an unlawful act results in a particular wrong to a particular person, our law, generally speaking, gives to such person a remedy by action against the wrongdoer. But it is hardly necessary to resort to principle, for the point is well covered by authority.

¹ Only the opinion of the court is given. — Ed.

The law writers of the age of Elizabeth refer to the action in question as a well-known one. Theloall, in his *Digest des Briefes* (lib. 2, cap. 12, fo. 59), states a case in which three plaintiffs may be joined in a brief in maintenance, and Rastall, in his *Entrees* under the head "Maintenance," gives a form of a count in such an action. Lord Coke, 2 Inst. 208, is equally clear. "An action of maintenance did lie at the common law," he says, in commenting on the Statute of Westminster the First, which on this point was declaratory of the common law. Comyns's *Digest* (title Maintenance, c. 1) is to the like effect. *Les Termes de la Ley*, p. 422, after defining maintenance, adds: "The party grieved shall have against him" (that is, the wrong-doer) "a writ, called a writ of maintenance." Lord Loughborough, in 1797, in *Wallis v. Duke of Portland*,¹ in like manner declared that such an action would lie at common law. In *Pechell v. Watson* the Court of Exchequer seem to have entertained no doubt as to the existence of such an action; and, lastly, in *Bradlaugh v. Newdegate*,² Lord Coleridge, C. J., upheld the action. In the face of this long chain of authorities the defendant's argument on this point is utterly untenable.

In the next place, the defendant alleges that he aided and maintained Nailer out of charity, and that charity is an answer to an action of maintenance. Now the facts of the case, as found by Wills, J., appear to us to be shortly, that the defendant Brisco aided Nailer out of charity, and because he believed him to be oppressed by Harris, but that in fact Nailer was not oppressed by Harris, and had no cause of action against him, and that Brisco took no reasonable pains to make inquiry into the real facts of the case, or to ascertain those facts, and that, if he had acted as a reasonable man, he would never have aided Nailer in an action, and thereby put Harris not only to the anxiety and trouble of being defendant in the action, but to the loss of his costs from the poverty of Nailer; and Wills, J., has held, as a matter of law, that the mere desire to benefit Nailer is not a defence to the present action, "unless the defendant had some reasonable ground for his belief that he was furthering the cause of justice and supporting the oppressed against the oppressor."

To the view taken by Wills, J., of the facts we entirely assent, but upon these facts two questions of law arise which have been argued before us, viz.: First, Is charity a defence to an action for maintenance? Secondly, Is thoughtless and inconsiderate kindness towards a particular person charity within the meaning of the defence, if such defence there be?

The doctrine that charity is an excuse for maintenance seems first to have found expression in our law in the case of *Rothewel v. Pewer*,³ in the course of which Martin, Justice of the Common Pleas, said: "I can give gold or silver to a man that is poor to maintain his plea, if he

¹ 3 Ves. 502.² 11 Q. B. D. 1.³ Y. B. 9 Hen. 6, p. 64.

himself cannot through his poverty : this is not maintenance against the law ;" and in *Power or Pomeroy v. Abbot of Buckfast*,¹ Paston, a judge of the Common Pleas, said :² " Suppose that I of my charity give a sum of money to a poor man who has a suit, in order to aid him in the suit ; it is no maintenance : no more is it in the case at the bar. Again, in 22 Hen. 6, p. 85, Prisot, Serjeant, who appears to have been counsel in the case, observed " that in writ of maintenance it is a good plea that he who is supposed to have been maintained is a poor man, and had no means to defend himself in the suit which the plaintiff had against him, and that the said new defendant of his alms gave him 20c., which is the same maintenance alleged."

These authorities found, as might be expected, their place in the Abridgments of Brooke and Rolle, and the result of them appears in Hawkins's Pleas of the Crown, 8th ed., vol. i., p. 460, in the statement that " it seems to be agreed that any one may lawfully give money to a poor man to enable him to carry on his suit," and in Blackstone's Commentaries, vol. iv., p. 184, in the words, " A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor out of charity and compassion with impunity." Similar statements are to be found in Viner's and Bacon's Abridgments, tit. " Maintenance."

It is, no doubt, remarkable that no case can be found in our law books in which the defence of charity has been actually raised to a proceeding for maintenance. But the proposition that charity is a good defence was asserted by the judges as well-known and understood law more than four hundred years ago, when the law of maintenance was more familiar than it is now, and it has been adopted and accepted by the compilers of the digests to which we are accustomed to look for guidance, and upon this proposition no judge, counsel, or writer has, so far as we can learn, thrown any doubt. We hold that the proposition is part of the law of England.

But, if the law be correctly laid down in the passages we have cited, it appears to us to follow that the limitation put on the meaning of the word " charity " by Wills, J., cannot be maintained. He requires that charity shall be thoughtful of its consequences, shall be regardful of the interest of the supposed oppressor, as well as of the supposed victim, and shall act only after due inquiry and upon reasonable and probable cause. If we were making new law and not declaring old law it would, in our opinion, be well worthy of consideration whether such a limitation of the doctrine that charity is an excuse for maintenance would not be wise and good. But is it not an anachronism to suppose any such view of charity to have been present to the minds of the judges of the reign of Henry VI.? — a view which even now is present to the minds only of a select few, and does not commend itself to a large proportion of the kind-hearted and charitable amongst mankind? To say that charity is not charity unless it be discreet, appears

¹ Y. B. 21 Hen. 6, p. 15.

² Y. B. 21 Hen. 6, p. 16.

to us without foundation in law. Of this limitation on the word "charity" no trace can be found in any of the authorities which have been cited, and, furthermore, in the other exceptions to the law of maintenance, such as those arising from the relations between lord and tenant, master and servant, neighbor and neighbor, there appears, so far as we can learn, to be no case or dictum in the books in which the duty of making inquiry, or of acting only on reasonable and probable grounds, has been recognized as a limitation of the right of giving assistance.

For these reasons, but not without regret, we differ from Wills, J., and think that his judgment must be reversed, and the action dismissed with costs here and below.

Appeal allowed.

* ¹ See also *British Cash v. Lamson Co.*, [1908] 1 K. B. 1006; *Smith v. Hogan*, 35 Wash. 200. — Ed.

CHAPTER VII.

MALICIOUS INJURY TO THE PLAINTIFF BY MEANS OF
A TORT TO A THIRD PERSON.

THE MIDLAND INSURANCE CO. v. SMITH AND WIFE.

IN THE QUEEN'S BENCH DIVISION, MARCH 23, 1881.

[Reported in Law Reports, 6 Queen's Bench Division, 561.]

WATKIN WILLIAMS, J.¹ This action is one of an extraordinary, and so far as I am aware of an unprecedented, character. The questions of law involved in the case, which was argued before me yesterday, arise upon demurrer to the statement of claim, and I now proceed to give judgment.

The facts, which for the purposes of the argument are assumed to be true, are as follows: The plaintiffs, an insurance company, granted to the defendant, Charles Smith, a policy of fire insurance, dated the 26th of June, 1880, by which they agreed with him that if certain property in a certain house should be destroyed or damaged by fire they would pay or make good all such loss or damage during the currency of the policy. The defendant Mary, the wife of the defendant Charles Smith, having been left by him in charge of the house and property insured did, with the malicious intention of destroying the insured property and of injuring the insurance company and of creating a claim upon the policy, wilfully set fire to and destroy the house and the insured property. Charles Smith, the assured, then made a claim upon the policy against the company. The company thereupon brought this present action against Smith and his wife, to recover damages for the loss which the company alleged they had sustained or might sustain through the wrongful and felonious act of the defendant Mary, if the defendant Charles made good his claim upon his policy.

I was informed in the course of the argument, although these facts do not appear formally before me, that the defendant Charles had, before this present action, brought an action against the company upon the policy to recover the amount of his loss, and that in that action the company disputed their liability on the ground that the loss, having been caused by the arson of the wife, was not covered by the policy, and that they had also set up a counter-claim for damages against Smith and his wife, who was brought in as a party to the action upon the same ground; that that action went down to trial, and that the learned judge, before whom the cause came on for trial,

¹ Only the opinion of the court is given. — Ed.

adjourned the proceedings in order to enable the company to test the validity in law of their contention in a separate and distinct manner before proceeding to try the question of arson. The present action was then commenced. The questions, however, for determination in this action must depend exclusively upon the facts set forth in the statement of claim, and the issues of law raised by the demurrer.

The company in support of their case started with the general principle that "every husband is liable for the wrongful acts of his wife," and that as the defendant Mary had wrongfully injured and destroyed the insured property, and had caused the damage upon which a claim upon the policy had been based, they, as the insurers of the property, had a right to sue her and her husband for the damage and injury so done by her, and not the less so because the husband happened to be himself the assured whom they had agreed to indemnify. In substance, the contention of the company came to this, that they ought not to be called upon to pay the assured the amount claimed, without being entitled concurrently to claim damages from him for the loss caused by the act of his wife, for which he is answerable.

The defendants, by their demurrer to this claim, raised two main issues of law. In the first place they said that the company were not in a position to maintain any action for the alleged damage done to the goods, because they were not the owners of the goods, nor had they sufficient interest therein to entitle them to maintain an action; that their only right as insurers would be to avail themselves of such rights and remedies as were vested in their assured, after they had admitted his claim and been subrogated to his rights in relation to the subject of insurance; and that, even if they had been subrogated to the rights of the assured, they could only sue in his name and could not maintain an action in their own name, and therefore that no such action could be maintained in the present case, because the assured had no right of action against his own wife.

In the next place the defendants contended that this action being based upon an act, which on the face of the statement of claim amounted to a felony, could not be maintained, because it was not shown that the rights of the public law had been vindicated by a prosecution of the felon.¹

Upon the first ground of demurrer the defendants are, in my judgment, clearly entitled to judgment both upon principle and upon authority. It appears to me that the insurance company have no right of action under the circumstances for the damage done to the goods by the defendant Mary. At the time when the damage was done to the goods the company had no property or interest in the goods sufficient to sustain any action for damage done to them; no right or interest in the goods could accrue to the insurance company, until they had

¹ The opinion of the court on this point is omitted. The defendants' contention was not sustained. — Ed.

acknowledged the claim under the policy, and by so doing entitled themselves to the benefit of any claims and causes of action vested in the assured; but it seems that even up to this moment the insurance company dispute the claim and deny the right of the assured to demand an indemnity under the policy. But, further, it seems to me equally clear that, if they had done everything to entitle themselves to the benefit of such a claim, it could only be enforced in the name of the assured and for the purpose of enforcing his rights, and inasmuch as he could have no such claim or right against his wife, it follows that in no possible view of the case is the plaintiffs' claim sustainable. The case of *Simpson v. Burrell*¹ is in point upon this question. In that case Burrell was the owner of two ships, one of which negligently ran down and sank the other with a valuable cargo. Burrell's underwriters upon the sunken ship paid him for a total loss, and were so subrogated to all his rights. A claim was made by the owners of the cargo in the sunken ship against Burrell, as the owner of the ship in fault, for the value of their goods, and Burrell, as the owner of the ship in fault, paid into court the whole value of that ship at £8 per ton, as the limit of his liability under the Merchant Shipping Acts, to be ratably divided among all who had sustained loss and damage by the ship being negligently run down and sunk; thereupon Burrell's underwriters upon the sunken ship who had paid for a total loss claimed to come in and share with the rest the money paid in by the ship in fault; but the House of Lords, reversing the decision of the Lords of Session in Scotland, decided that they had no such right, and the reasoning in that case is directly applicable to the present. The Lord Chancellor Cairns said, "The view of the Lord President therefore appears to be that, after payment by the underwriters as on a total loss, there is effected by some independent operation of law a transfer of whatever, if anything, can be recovered in specie of the thing insured — and by reason of the transfer of the thing insured an independent right in the underwriters to maintain in their own name, and without reference to the person assured, an action for the damage to the thing insured which was the cause of the loss. I am not aware of any authority for the view of the case thus taken. I know of no foundation for the right of the underwriters, except the well-known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Lord Penzance said: "The learned counsel for the underwriters contended that they, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract, and that

¹ 3 App. Cas. 279.

this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this,—that where damage is done by a wrongdoer to a chattel, not only the owner of the chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation. This, I say, is the principle involved in the respondent's contention. If it be a sound one, it would seem to follow that if by the negligence of a wrongdoer goods are destroyed, which the owner of them had bound himself by contract to supply to a third person, this person, as well as the owner, has a right of action for any loss inflicted upon him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of the attendance and medicine cast upon him by the accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer, bound for a term to a manager of a theatre, is disabled by the wrongful act of a third person to the serious loss of the manager; can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relations is daily created by contract, might be both numerous and novel." See, also, the cases of *Randal v. Cockran*,¹ *North of England Insurance Association v. Armstrong*,² *Stewart v. Greenock Marine Insurance Co.*,³ *Davidson v. Case*,⁴ *Mason v. Sainsbury*,⁵ *Yates v. Whyte*.⁶

This action cannot therefore in my judgment be maintained, nor is there any substantial injustice in such a result, because, as it seems to me, the insurance company are in this dilemma; the loss and damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against; now, if it is such a loss, an attempt by the company to enforce against the husband a return indemnity or reimbursement is at variance with the very

¹ 1 Ves. Sen. 97.

² 2 H. L. C. 159.

³ 3 Douglas, 61.

⁴ Law Rep. 5 Q. B. 244.

⁵ 8 Price, 542.

⁶ 4 Bing. N. C. 272.

substance of their undertaking to indemnify him; if, on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses covered by the policy, then this action is as wholly misconceived, unnecessary, and unfounded, as if the loss had been caused by any other risk not covered by the policy. The truth is that the real and substantial contention on the part of the insurance company is, that the loss in question having been caused by the wilful act of the wife of the assured, although acting without the privity of her husband, is not a loss covered or insured against by the policy. That question might be raised in the action brought by the assured against the company upon the policy, but it does not arise, and indeed could not be raised, so as to receive a binding and judicial determination, in such an action as the present. As however the question has been fully and ably argued before me, and as the parties have expressed a desire to elicit an opinion upon the point, I have no hesitation in saying that it appears to me to be upon principle perfectly clear and free from doubt that such a loss would be covered by an ordinary policy against loss caused by fire; under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself or some one acting with his privity and consent. In order to escape from responsibility for such a loss as the present the company ought to introduce into their policy an express exception.

Judgment for the defendants.

CHAPTER VIII.

MALICIOUS USE OF ONE'S OWN PROPERTY IN ORDER TO
INJURE THE PLAINTIFF.

MAHAN v. BROWN.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1835.

[Reported in 13 Wendell, 261.]

THIS was an *action on the case*, tried at the Albany Circuit in September, 1833, before the Hon. James Vanderpoel, one of the circuit judges.

The suit was brought for the *obstruction of lights* in the dwelling-house of the plaintiff by the wanton and malicious erection of a fence fifty feet high, without benefit to the defendant, but for the sole purpose of annoying the plaintiff.

On the trial of the cause, the counsel for the plaintiff, in his opening to the jury, stated that the dwelling-house of the plaintiff was built on a lot adjoining the lot of the defendant; that a recess was cut into the side of the house adjoining the lot of the defendant, in which windows were placed for the admission of light and air; that the defendant, under the pretence of preventing his yard from being overlooked by the windows in the plaintiff's house, but in fact from *mere malice* and with the intent to exclude the light and air from the windows in question, had erected on his own lot a fence forty feet high, opposite the recess or opening in the house of the plaintiff, in consequence whereof the light and air had been excluded from the windows, and the plaintiff had sustained great damage, by her apartments which had been occupied by boarders being rendered untenable. The counsel admitted that the *upper* windows in the house of the plaintiff did overlook the yard of the defendant, but that a fence had been erected by the plaintiff twenty feet high, to prevent the defendant's yard being overlooked from the *lower* windows. He also admitted that the plaintiff did not claim that the windows were *ancient lights*, or that a right had been acquired by her, by *grant or occupation and acquiescence*. On this opening, the counsel for the defendant moved that the plaintiff be *nonsuited*, inasmuch as it was not proposed to prove that she had a right or title to the privileges complained to have been destroyed; which motion was granted by the judge, and the plaintiff was accordingly nonsuited. A motion was now made that the nonsuit be set aside, and a new trial granted.

S. Stevens, for the plaintiff.

A. Taber, for the defendant.

By the Court, SAVAGE, Ch. J. That an action upon the case lies for stopping the *ancient lights* of another is too well settled to require discussion or authority to support it. Formerly, indeed, it was holden that the lights must be ancient and beyond the memory of man. And in the case of *Bury v. Pope*,¹ it was agreed by all the justices that where two own adjacent lands, and one builds and makes windows looking on the lands of the other, and continues for 30 or 40 years, yet the other may lawfully erect on his own soil an house or other thing against said lights, without being liable to an action; for it was the folly of the first to build his house so near the other's land. And the maxim is quoted, *cujus est solum, ejus est summitas usque ad cælum*. Now, however, it is perfectly settled, that as the occupant may acquire a right to the house itself by 20 years' uninterrupted possession under claim of title, so in the same time he shall by occupation acquire a right to an easement belonging to the house. *Yelv. 216; 2 Saund. 175, a, b, c.* It is true that 20 years' possession does not strictly confer a right absolutely, but it raises a presumption of a grant. *2 Barn. & Cress. 686.* The person who thus opens a window overlooking the privacy of his neighbor, enjoys an easement in that which does not belong to him. Yet no action lies for this encroachment upon the rights of the person whose lands are thus overlooked; the encroachment will in 20 years ripen into a right, and it is said that the only remedy is to build on the adjoining land opposite to the offensive window. *3 Campb. 80.*

The present is not a case of ancient lights. It is not contended that the action can be sustained upon that ground, but upon the principle that no one shall so use his own property as to injure another. Thus, no man has a right to erect upon his own land, near the house of another, any manufactory which shall poison the air and render it unwholesome. So in *Morley v. Pragnell*,² an action was held to lie by an innkeeper against the defendant for erecting a tallow furnace, which annoyed his house with stench, by reason of which his guests left him, and his family became unhealthful. So in *Aldred's Case*,³ the plaintiff brought an action against Burton, the defendant, for erecting a hog-house and putting his hogs therein; and by reason of the fetid smells the plaintiff and his family could not remain in his house. The plaintiff recovered. The defendant moved in arrest of judgment, that one ought not to have so delicate a nose that he cannot bear the smell of hogs, for they are necessary to the food of man; but it was resolved that the action lay. In these cases, however, it is to be observed that a positive right was invaded. Every person is entitled to the use of the elements in their natural purity, and whoever poisons them or renders them unhealthy, violates that right. The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do; although it is said no action lies for it. He is therefore encroaching, though not strictly and legally trespassing upon

¹ Cro. Eliz. 118.² Cro. Car. 510.³ 9 Co. 48.

the rights of another. He enjoys an easement therefore in his neighbor's property, which in time may ripen into a right.¹ But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. Suppose an obliging farmer permits his neighbor to pass and repass through his fields, to go to the lands of that neighbor; if this is permitted for 20 years, it becomes an easement, a right of way, which the owner of the soil cannot infringe; but at the end of ten years, he chooses, from mere malice or wantonness, to shut up this passage, and refuses permission to his neighbor to pass over his lands, as he used to do for ten years past; does an action lie? Most certainly not. And yet that case is not distinguishable, in principle, from that under consideration. The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint.

The motion to set aside the nonsuit denied.²

LEON RIDEOUT v. DAVID KNOX AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 4, 1889.

[Reported in 148 Massachusetts Reports, 368.]

TORT against David Knox and Elizabeth E. Knox, his wife. The action was based on chapter 848 of the Statutes of the year 1887.³

¹ The law in this country is against the acquisition of such an easement by lapse of time. *Guest v. Reynold*, 68 Ill. 478; *Parker v. Foote*, 19 Wend. 309; *Myers v. Gemmel*, 10 Barb. 537. — Ed.

² *Auburn Co. v. Douglas*, 9 N. Y. 447, 450 (*semble*); *Pickard v. Collins*, 23 Barb. 444 *Accord*.

But see *Thurston v. Hancock*, 12 Mass. 220, 226, 227. — Ed.

³ This statute, entitled "An Act in relation to fences and other structures erected to annoy, and for the abatement of nuisances," and "Approved June 2, 1887," is as follows: —

"Section 1. Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Section 2. Any such owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby, and the provisions of chapter one hundred and eighty of the Public Statutes concerning actions for private nuisances shall be applicable thereto."

At the trial in the Superior Court, before Lathrop, J., the evidence showed that the plaintiff and the defendants were the occupants of adjoining estates on Johnson Street in Lynn; that the structure complained of, which was about seventy-five feet long and eleven feet high, and composed of slats set into posts, was erected in November, 1886, on the order of Mrs. Knox, with the concurrence and assent of her husband, on her land, against the fence which stood on the line dividing the estates of the parties; that the structure was about two and a half feet from some of the windows of the plaintiff's house, and about six inches from one window, the lower part of which was of ground glass.

David Knox testified that the structure in question was erected as a trellis on which to trail vines, and not for the purpose of injuring the plaintiff in the comfort or enjoyment of his estate.

The defendants asked the judge to rule:—

"1. That the plaintiff had no action, as chapter 348 of the Acts of the year 1887 was unconstitutional.

"2. That the structure must be erected for the sole purpose of annoyance; even if a motive to annoy existed, if it was inferior to a motive of use or adornment of the defendants' estate, and if there was a *bona fide* use of the structure, beneficial to the defendants, the plaintiff cannot recover."

The judge declined to give the first ruling requested, but ruled that the statute was constitutional; defined the terms "maliciously" and "unnecessarily;" and gave other instructions appropriate to the case.

As to the second request for instructions, the judge, after instructing the jury that the plaintiff must prove that the structure was maliciously maintained for the purpose of annoying the plaintiff, and that "annoying" meant "injuring" the plaintiff, either in his comfort or the enjoyment of his estate, instructed the jury as follows: "The defendants say the structure was not put up for any such purpose; that it was put up for a perfectly legitimate purpose, namely, as a trellis on which to train vines. If you believe that that was the sole purpose for which the structure was put up, then the plaintiff has not made out his case. But if the defendants had in mind in maintaining the structure, or if it was their intention in maintaining it, not only to use it for the purpose of training vines, but also for the purpose of injuring the plaintiff, either in his comfort or in the enjoyment of his estate, then the plaintiff has made out that part of his case."

The jury returned a verdict for the plaintiff for the sum of one cent; and the defendants alleged exceptions.¹

J. R. Baldwin, for the defendants.

W. H. Niles and *G. J. Carr*, for the plaintiff.

HOLMES, J. This is an action of tort, under the Statute of 1887, c. 348. The plaintiff has had a verdict for nominal damages, and the first question raised by the bill of exceptions is the constitutionality of the

¹ The case is somewhat abridged. — Ed.

statute. Another question more or less connected with the former is whether the structure, in order to bring it within the act, must be erected or maintained for the purpose of annoyance as the dominant motive, or whether it is enough if that purpose existed, although subordinate to a *bona fide* use for legitimate purposes.

At common law a man has a right to build a fence on his own land as high as he pleases, however much it may obstruct his neighbor's light and air. And the limit up to which a man may impair his neighbor's enjoyment of his estate by the mode of using his own is fixed by external standards only. *Walker v. Cronin*; *Chatfield v. Wilson*; *Phelps v. Nowlen*; *Frazier v. Brown*; ¹ *Martin, B., in Rawstron v. Taylor*.² See *Benjamin v. Wheeler*.³

But it is plain that the right to use one's property for the sole purpose of injuring others is not one of the immediate rights of ownership; it is not a right for the sake of which property is recognized by the law, but is only a more or less necessary incident of rights which are established for very different ends. It has been thought by respectable authorities, that even at common law the extent of a man's rights in cases like the present might depend upon the motive with which he acted. *Greenleaf v. Francis*.⁴ See *Carson v. Western Railroad*; ⁵ *Roath v. Driscoll*; ⁶ *Wheatley v. Baugh*; ⁷ *Swett v. Cutts*.⁸

We do not so understand the common law, and we concede further, that to a large extent the power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation. It may be assumed that, under our Constitution, the Legislature would not have power to prohibit putting up or maintaining stores or houses with malicious intent, and thus to make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motives of the owner.

But it does not follow that the rule is the same for a boundary fence unnecessarily built more than six feet high. It may be said that the difference is only one of degree: most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain. *Sawyer v. Davis*.⁹

The statute is confined to fences and structures in the nature of fences, and to such fences only as unnecessarily exceed six feet in height. It is hard to imagine a more insignificant curtailment of the rights of property. Even the right to build a fence above six feet is

¹ 12 Ohio St. 294.

⁴ 18 Pick. 117, 121, 122.

⁷ 25 Penn. St. 528.

² 11 Exch. 369, 378, 384.

⁵ 8 Gray, 423, 424.

⁸ 50 N. H. 439, 447.

³ 8 Gray, 409, 413.

⁶ 20 Conn. 533, 544.

⁹ 196 Mass. 239, 243.

not denied, when any convenience of the owner would be served by building higher. It is at least doubtful whether the act applies to fences not substantially adjoining the injured party's land. The fences must be "maliciously erected or maintained for the purpose of annoying" adjoining owners or occupiers. This language clearly expresses that there must be an actual malevolent motive, as distinguished from merely technical malice. The meaning is plainer than in the case of statutes concerning malicious mischief. *Commonwealth v. Walden*.¹ See *Commonwealth v. Goodwin*.²

Finally, we are of opinion that it is not enough to satisfy the words of the act that malevolence was one of the motives, but that malevolence must be the dominant motive, — a motive without which the fence would not have been built or maintained. A man cannot be punished for malevolently maintaining a fence for the purpose of annoying his neighbor merely because he feels pleasure at the thought he is giving annoyance, if that pleasure alone would not induce him to maintain it, or if he would maintain it for other reasons even if that pleasure should be denied him. If the height above six feet is really necessary for any reason, there is no liability, whatever the motives of the owner in erecting it. If he thinks it necessary, and acts on his opinion, he is not liable because he also acts malevolently.

We are of opinion that the statute thus construed is within the limits of the police power, and is constitutional, so far as it regulates the subsequent erection of fences. To that extent, it simply restrains a noxious use of the owner's premises, and although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. See *Commonwealth v. Alger*; ³ *Watertown v. Mayo*; ⁴ *Train v. Boston Disinfecting Co.*⁵ See also *Talbot v. Hudson*.⁶

Whether the statute is constitutional with reference to fences already in existence when the act was passed, is a more difficult question.⁷

Exceptions sustained.

¹ 3 Cush. 558.

² 122 Mass. 19, 35.

³ 7 Cush. 53, 86, 96.

⁴ 109 Mass. 315.

⁵ 144 Mass. 523.

⁶ 16 Gray, 417, 423.

⁷ The court answered this question in the affirmative. — Ed.

LETTS v. KESSLER.

1896. 54 Ohio State, 73.¹

PETITION by Kessler against Letts, to restrain the completion of a high board fence which Letts was building on his own land.

A demurrer was overruled.

The circuit court finds the facts to be as follows:—

That the plaintiff owns and occupies premises, situated on Lake street, in the city of Cleveland, known as "The Osborn," and said plaintiff owned and occupied said premises at the time of the erection of the structure hereinafter described. Said premises were used by plaintiff as a boarding house. Defendant owns and occupies premises adjoining plaintiff on the east. Between the two houses is a driveway and open space about twenty feet wide. Plaintiff and defendant had litigation in May, 1891, on account of defendant's having attached a shed roof to her building without consent of said plaintiff. About two weeks after the trial of said lawsuit, the defendant took down said shed roof, and built up against the house of said plaintiff a tight board fence. The said fence was eighty-six feet long. The scantlings were placed against the wall of said plaintiff's house and reached up under the eaves of the same. Boards were nailed onto the said scantlings, beginning about two feet from the ground and extending to the sills of the second story windows. Defendant nailed onto the rear portion of said fence and extending about forty feet toward the front, a shed roof. Under this shed roof defendant had lumber piled. Said board fence completely covered up the bath room, kitchen, bed room and library windows, rendering said portion of the house dark, damp, and uninhabitable, and causing substantial damage to the same. Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unmixed malice toward said plaintiff and for no useful or ornamental purposes of the property of said defendant, except said shed roof and its back wall below the shed roof, which may subserve some useful purpose of defendant, in the use of his property, by protecting his lumber pile thereunder.

Decree: that defendant be enjoined from proceeding further with the erection of the fence; and that defendant take down all of said fence and scantling projecting above the roof of said shed, and all the remainder of said fence outside of and beyond said shed.

Petition in error to reverse the judgment.

L. A. Willson and *Edward David*, for plaintiff in error.

C. J. Estep and *S. S. Ford*, for defendant in error.

BURKET, J. The only question in this case arises upon the following findings of fact by the circuit court:—

¹ Statement abridged. Arguments omitted. — Ed.

"Said structure was erected upon the land of the defendant and belonged to him. The structure was erected by said defendant from motives of unmixed malice toward said plaintiff, and for no useful or ornamental purposes of the property of said defendant."

It is not claimed that the person of the plaintiff was interfered with in this case, so that we have for consideration only the rights of property.

The fence complained of is upon the land of the defendant and belongs to him. Plaintiff fails to aver, and the court fails to find, that she has any right to, or upon, the lot of defendant below by contract, statute, or any other way known to the law for acquiring a right to, in, or upon lands, unless such right may be acquired by, and transferred to her, by means of the aforesaid "motives of unmixed malice." This is a manner of acquiring on the one hand, and of transferring on the other, a right to property unknown to the law.

But it is urged in her behalf, that even if she had no right of property, and even if he was the owner of the lot, that he could not use his own land for the purpose of erecting structures thereon which subserve no useful or ornamental purpose, and are erected through motives of unmixed malice towards his adjoining neighbor.

It is and must be conceded that he might, by erecting a building on his lot, shut off her light and air to exactly the same extent as is done by this fence, and that in such case she would be without right and without remedy, even though done with the same feelings of malice as induced him to erect the fence; thus making his acts lawful when the malice is seasoned with profit, or some show of profit to himself, and unlawful when his malice is unmixed with profit, the injury or inconvenience to her, meanwhile, remaining the same in both cases. If through feelings of malice he desires to shut the light and air from her windows, it is nothing to her whether he makes a profit or loss thereby. Her injury is no greater and no less in the one case than in the other. As to her it is the effect of the act, and not the motive.

In effect he has the right to shut off the light and air from her windows by a building on his own premises, and she is not in effect concerned in the means by which such effect is produced, whether by a building or other structure; nor is she concerned as to the motive, nor as to whether he makes or loses by the operation. In the one case she might have a strong suspicion of his malice, while in the other such suspicion would be ripened into a certainty. But this is nothing to her as affecting a property right. As long as he keeps on his own property, and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so, would not be enforcing a right of property, but a rule of morals. It would be controlling and directing his moral conduct by a suit in equity, by an injunction.

To permit a man to cause a certain injurious effect upon the pre-

mises of his neighbor by the erection of a structure on his own premises if such structure is beneficial or ornamental, and to prohibit him from causing the same effect in case the structure is neither beneficial nor ornamental, but erected from motives of pure malice, is not protecting a legal right, but is controlling his moral conduct. In this state a man is free to direct his moral conduct as he pleases, in so far as he is not restrained by statute.

But it is said that such acts are offensive to the principles of equity. Not so. There is no conflict between law and equity in our practice, and what a man may lawfully do cannot be prohibited as inequitable. It may be immoral, and shock our notions of fairness, but what the law permits, equity tolerates. It would be much more inequitable and intolerable to allow a man's neighbors to question his motives every time that he should undertake to erect a structure upon his own premises, and drag him before a court of equity to ascertain whether he is about to erect the structure for ornament or profit, or through motives of unmingled malice.

The case is not like annoying a neighbor by means of causing smoke, gas, noisome smells, or noises to enter his premises, thereby causing injury. In such cases something is produced on one's own premises and conveyed to the premises of another; but in this case nothing is sent, but the air and light are withheld. A man may be compelled to keep his gas, smoke, odors and noise at home, but he cannot be compelled to send his light and air abroad. *Mullen v. Stricker*, 19 Ohio St. 135.

If smoke, gas, offensive odors, or noise pass from one's own premises to or upon the premises of another to his injury, an action will lie therefor, even though the smoke, gas, odor or noise should be caused by the lawful business operations of defendant and with the best of motives. *Broom's Legal Maxims*, 372.

In such cases it is the effect or injury, and not the motive, that is regarded. The true test is, whether anything recognized by law as injurious, passes from the premises of one neighbor to that of another. Anything so passing invades the legal rights of him whose premises it reaches, and such rights will be protected. But courts cannot regulate or control the moral conduct of a man, unless authorized so to do by statute.

The following cases, cited by plaintiff in error, bear more or less upon the question involved in this case, and seem to produce a decided weight of authority in his favor: *Frazier v. Brown*, 12 Ohio St. 294; *Falloon v. Schilling*, 29 Kan., 292; *Mahan v. Brown*, 13 Wendall, 261; *Greenleaf v. Francis*, 18 Pick. 123; *Chatfield v. Wilson*, 28 Vt. 49.

The following additional authorities are to the same effect:—

[Citations omitted.]

The defendant in error cites the cases reviewed in *Frazier v. Brown*, 12 Ohio St. 294, and also the case of *Burke v. Smith*, 69 Mich. 380. Most of the cases cited are cases arising out of interference with wells,

springs, and percolating waters; such cases bear but slightly upon the question. The Michigan case is substantially like the case under consideration. In that case the lower court enjoined the defendant, and that judgment was affirmed by an equally divided court. The syllabus says that the court being equally divided, nothing is decided. As nothing was decided, the case is not an authority on either side of the question.

But it is strongly urged by counsel for defendant in error, that the maxim, "Enjoy your own property in such a manner as not to injure that of another person," applies in such cases as this, and that as it must be conceded that the fence in question is an injury to the property of defendant in error, that his acts are in conflict with the above maxim.

At first blush this would seem to be so, but a careful consideration shows the contrary. The maxim is a very old one, and states the law too broadly. In this case, for instance, it is conceded that the plaintiff in error had the right to enjoy his property by erecting a house so as to do the same injury which was done by the fence, and that while that would be an injury to the property of defendant in error, she would be without remedy, and his act in erecting such house would not be regarded as violating the maxim.

In *Jeffries v. Williams*, 5 Exch. 797, it was claimed, and in *Railroad Company v. Bingham*, 29 Ohio St. 369, it was held, that the true and legal meaning of the maxim is, "So use your own property as not to injure the rights of another." Boynton, J., in that case says: "Where no right has been invaded, although one may have injured another, no liability has been incurred. Any other rule would be manifestly wrong." The maxim should be limited to causing injury to the rights of another, rather than to the property of another, because for an injury to the rights of another there is always a remedy, but there may be injuries to the property of another for which there is no remedy, as in draining a spring or well, or cutting off light and air or a pleasant view by the erection of buildings, and many other cases which might be cited.

Thus limiting the maxim to the rights of the defendant in error, it is plain that the acts of plaintiff in error in the use which he made of his property did not injure any legal right of hers, and that therefore what he did, was not in violation of such maxim.

Judgment reversed.

HORAN v. BYRNES.

1903. 73 *New Hampshire*, 93.¹

CASE, under sections 28 and 29, chapter 143, Public Statutes, for maintaining a structure in the nature of a fence, in violation of the statute.

Upon the trial, defendant moved for a nonsuit, on the ground that the statute is unconstitutional. The motion was denied, and defendant excepted.

Verdict for the plaintiff.

Patrick H Sullivan, for plaintiff.

Brown, Jones & Warren, for defendant.

PARSONS, C. J. "Any fence or other structure in the nature of a fence, unnecessarily exceeding five feet in height, erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance.

"Any owner or occupant, injured either in his comfort or the enjoyment of his estate by such nuisance, may have an action of tort for the damage sustained thereby.

"If the plaintiff recovers judgment in the action, the defendant shall cause the removal of the nuisance within thirty days from the date of the judgment, and for each day he shall permit the nuisance to remain after the expiration of said thirty days he shall incur a penalty of ten dollars for the use of the party injured." P. S. c. 143, ss. 28, 29, 30.

The act forbids the use by one landowner of his land for the unnecessary erection of a fence exceeding five feet in height, when the purpose of such unnecessary height is the annoyance of the adjoining owner or occupant, if such unnecessary height injures the adjoining owner in his comfort or the enjoyment of his estate. The claim of the defendant in support of his motion for a nonsuit, that the statute is unconstitutional, raises the question whether the statutory prohibition is an interference with the defendant's "natural, essential, and inherent" right of "acquiring, possessing, and protecting property," or deprives him of that protection in its enjoyment, which is the right of "every member of the community." Bill of Rights, arts. 2, 12.

The constitutional objection made to the present statute raises the question, if it appears that the statute is an interference with the defendant's property right, whether the interference is or not one which the legislature might properly make as a regulation of the use of property. The constitutionality of similar statutes has been upheld upon the latter ground, as being merely a small limitation of existing rights incident to property, which under the police power may be imposed for the sake of preventing a manifest evil. "It is hard," it has been

¹ Statements abridged. Portions of opinion omitted. — ED.

said, "to imagine a more insignificant curtailment of the rights of property." *Rideout v. Knox*, 148 Mass. 368, 372, 373; *Karasek v. Peier*, 22 Wash. 419; *Western, etc. Co. v. Knickerbocker*, 103 Cal. 111. Similar statutes in Maine, Vermont, and Connecticut have been before the courts, but it has not been suggested that the power of the legislature to adopt them has been attacked in those states. *Lord v. Langdon*, 91 Me. 221; *Harbison v. White*, 46 Conn. 106; *Gallagher v. Dodge*, 48 Conn. 387, — 40 L. R. A. 181-183, note.

The present statute was passed in 1887. Laws 1887, c. 91. In *Hunt v. Coggin*, 66 N. H. 140, the verdict was for the defendant; and in *Horan v. Byrnes*, 70 N. H. 531, the defendant waived any objection to the statute upon this ground. In *Lovell v. Noyes*, 69 N. H. 263, the question was whether a building was within the terms of the statute. The constitutional question is now presented for the first time.

It is objected in answer to the argument that statutes like the present are within the constitutional exercise of the police power, involving for the general good some slight limitation of existing property rights, that if one incident of the property right in real estate is the right to use it maliciously for the sole purpose of injuring another, it is as much an invasion of the right to take it from a small portion as from the whole of one's property; and that the matter in question concerns private individuals and not the public in general, and hence does not come within the police power. *State v. White*, 64 N. H. 48, 50. It may be thought these objections are successfully answered in the cases cited, or that, if not there answered, a satisfactory answer can be found. But a discussion of these objections does not reach the fundamental question in the case.

"The statute was designed to prevent an act the sole effect of which would be to annoy or injure another." *Lovell v. Noyes*, 69 N. H. 263. The primary question, therefore, is whether one's right to use property solely to injure another is a part of his property right in real estate, which is so protected by the constitution that the prohibition of such use is not within the general power of legislation "for the benefit and welfare of this state and for the governing and ordering thereof." Const. art. 5. Upon the question whether a fence on or near the division line between adjoining landowners, maliciously built to an unreasonable height for the sole purpose of annoying and injuring the adjoining owner or occupant, is a nuisance which can in the absence of statutory authority be abated by an injunction, the courts are in conflict. *Letts v. Kessler*, 54 Ohio St. 73, answers the question in the negative, while an opposite conclusion is reached in Michigan. *Burke v. Smith*, 69 Mich. 380; *Flaherty v. Moran*, 81 Mich. 52; *Kirkwood v. Finegan*, 95 Mich. 543. In *Rideout v. Knox*, 148 Mass. 368, and *Karasek v. Peier*, 22 Wash. 419, cases in which the power of the legislature to enact a statute similar to that under consideration is attacked and upheld, it is conceded "that to a large extent the

power to use one's property malevolently, in any way which would be lawful for other ends, is an incident of property which cannot be taken away even by legislation." *Rideout v. Knox, supra*, 372.

The conclusion that a landowner's property right in real estate includes the right to use it solely for the injury and annoyance of his neighbor, without intending to subserve any useful purpose of his own, is "based upon a narrow view of the effect of the land titles," and is reached "by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim," *cujus est solum, ejus est usque ad coelum*. The courts of this state have had in some respects, at least, a different understanding of the elements of landownership. As to the use of land in the control of surface water, the enjoyment of water percolating beneath the surface, and the use generally that may be rightfully made of real estate by the owner or occupant, the test has been considered to be not merely whether the act was an exercise of dominion on the land regardless of the injury to other land, but the reasonableness of the use under all the circumstances, including the necessity and advantage to one and the unavoidable injury to the other. *Franklin v. Durgée*, 71 N. H. 186; *Ladd v. Brick Co.*, 68 N. H. 185; *Swett v. Cutts*, 50 N. H. 439; *Bassett v. Company*, 43 N. H. 569, 577. It has been said that the rule of absolute dominion is easier of application. *Chase v. Silverstone*, 62 Me. 175, 183. This view, however, does not seem to be upheld by the difficulties met in its application in reference to surface waters. See *Franklin v. Durgée*, 71 N. H. 186, 189. But however that may be, difficulty in administration is not a sufficient reason for the denial of justice. Cases like *Chatfield v. Wilson*, 28 Vt. 49, and *Phelps v. Nowlen*, 72 N. Y. 39, in which the principle of the maxim relied upon is applied to waters in the soil, are not authority here, where a contrary view is entertained. *Franklin v. Durgée* and *Bassett v. Company, supra*.

Aside from the authorities in cases in which the control of waters was in question, the leading case appears to be *Mahan v. Brown*, 13 Wend. 261. Here, although the plaintiff alleged that the fence complained of was erected solely to injure her, the decision is upon the ground that by the erection of the fence the plaintiff is deprived of no right, but is merely prevented from acquiring a right. If by enjoyment of light and air across his neighbor's land for the prescriptive period a landowner could acquire a right to such enjoyment, the building of a fence as an assertion of a contrary right and to prevent the acquiring of such easement would be a building for a necessary and useful purpose, and not for the sole purpose of annoying another. The case standing upon a view of the effect of non-user of a right to build, now generally abandoned in this country (Wash. Ease. 490, 497, 498), is not of value in the present discussion. The argument generally is, that the motive with which one does an act otherwise lawful is immaterial; and hence, as it must be conceded that a land

owner has the right to build on his land as he conceives may best subserve his interests, the act lawful for a useful purpose is not made unlawful and a nuisance merely by the intent accompanying it.

Whether the first proposition is entirely true may perhaps be doubted. Cases cited to support the proposition (*Walker v. Cronin*, 107 Mass. 555; *Phelps v. Nowlen*, 72 N. Y. 39) do not support it in its entirety. See *Chesley v. King*, 74 Me. 164. In *Houston v. Laffee*, 46 N. H. 505, which was trespass for cutting an aqueduct pipe maintained by the plaintiff upon the defendant's land by a parol license, it was held that if the cutting of the pipe was done simply for the purpose of putting an end to the license, and without any malice or intentional wrong, the defendant would not be liable; but if the pipe was cut "wantonly, unnecessarily, maliciously, and with a view . . . to injure the plaintiff," the defendant would be liable. It is true that an act which one has the right to do under all circumstances, like the bringing of a suit upon a valid claim (*Friel v. Plumer*, 69 N. H. 498), cannot be made actionable by the motive which accompanies it. But as applied to the use of real estate the argument begs the question, which is whether the enjoyment of real estate includes the right to use it solely to injure another. Because when employed for a useful purpose such use may rightfully injure another, it does not follow that the same use for a wrongful purpose may also rightfully injure another, except upon the theory of absolute dominion, for the character of the use is an element of the right.

"As a general proposition, it is safe to say that the owner of land has a right to make a reasonable use of his property; and that right extends as well to an unlimited distance above the earth's surface as to an unlimited distance below. He may not only dig for a foundation and a cellar as deep as he pleases, but he may erect his building as high as he pleases into the air, subject all the time, of course, to a proper application of the doctrine contained in the maxim, *sic utere tuo ut alienum non ledas*. The erection and maintenance of buildings for habitation or business is a customary and reasonable use of land. Of course the landowner, in making such erections, must be held to the exercise of all due care against infringing the legal rights of others, to be determined by the nature of the rights and interests to be affected, and all the circumstances of each particular case." *Ladd, J.*, in *Garland v. Towne*, 55 N. H. 55, 58.

"Property in land must be considered, for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges, the limits of which are prescribed by the equality of rights and the correlation of rights and obligations necessary for the highest enjoyment of land by the entire community of proprietors. . . . The soil is often called property, and this use of language is sufficiently accurate for some purposes. But the proposition that the soil is property conveys a very imperfect idea of the numerous and variously limited rights comprised in landed estate; and it is sometimes neces-

sary to remember that the name of property belongs to some of the essential proprietary rights vested in the person called the owner of the soil. . . . So these proprietary rights, which are the only valuable ingredients of a landowner's property, may be taken from him, without an asportation or adverse personal occupation of that portion of the earth which is his in the limited sense of being the subject of certain legally recognized proprietary rights which he may exercise for a short time. . . . One of Eaton's proprietary rights was the correlative of R's duty of abstaining from such a use of air and water, and from such an interference with their quality and circulation, as would be unreasonable and injurious to the enjoyment of Eaton's farm." *Thompson v. Androscoggin Co.*, 54 N. H. 545, 551, 552, 554. "Excavations maliciously made in one's own land, with a view to destroy a spring or well in his neighbor's land, could not be regarded as reasonable." *Swett v. Cutts*, 50 N. H. 439, 447.

"If a man has no right to dig a hole upon his premises, not for any benefit to himself or his premises, but for the express purpose of destroying his neighbor's spring, why can he be permitted to shut out light and air from his neighbor's windows maliciously, and without profit or benefit to himself? By analogy, it seems to me that the same principle applies in both cases, and that the law will interpose and prevent the wanton injury in both cases. . . . It must be remembered that no man has a legal right to make a malicious use of his property . . . for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine in cases like the present to injure and destroy the peace and comfort, and to damage the property, of one's neighbor, for no other than a wicked purpose, which in itself is or ought to be unlawful. The right to do this cannot, in an enlightened country, exist either in the use of property or in any way or manner. . . . The right to breathe the air, and to enjoy the sunshine, is a natural one; and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor." Morse, J., in *Burke v. Smith*, 69 Mich. 380, approved and unanimously adopted in *Flaherty v. Moran*, 81 Mich. 52, above cited.

"While one may in general put his property to any use he pleases not in itself unlawful, his neighbor has the same right to the undisturbed enjoyment of his adjoining property. . . . What standard does the law provide? . . . Whatever may be the law in other jurisdictions, it must be regarded as settled in this state that the test is the reasonableness or unreasonableness of the business in question under all the circumstances." *Ladd v. Brick Co.* 68 N. H., 185, 186. "The common-law right of the ownership of land, in its relationship to the control of surface water, as understood by the courts of this state for many years, does not sanction or authorize practical injustice to one

landowner by the arbitrary and unreasonable exercise of the right of dominion by another" (*Franklin v. Durgee, supra*), but makes the test of the right the reasonableness of the use under all the circumstances. In such case the purpose of the use, whether understood by the landowner to be necessary or useful to himself, or merely intended to harm another, may be decisive upon the question of right. It cannot be justly contended that a purely malicious use is a reasonable use. The question of reasonableness depends upon all the circumstances — the advantage and profit to one of the use attacked, and the unavoidable injury to the other. Where the only advantage to one is the pleasure of injuring another, there remains no foundation upon which it can be determined that the disturbance of the other in the lawful enjoyment of his estate is reasonable or necessary. There is no sound ground upon which a distinction can be made against the plaintiff's right to use his land for the enjoyment of the air and light which naturally come upon it, in favor of his right to use it to enjoy the waters which naturally flow upon or under it, except the fact that the use of land for buildings necessarily cuts off air and light from the adjoining estate. The fact that the improvement of real estate in this way for a useful purpose, universally conceded to be reasonable, may affect the adjoining owner's enjoyment of his estate to the same extent as a like act done solely to injure the other, is not a sufficient reason for distinguishing the right to build upon the surface from the right to dig below it or to control the surface itself. Jurisdictions which reject the doctrine of reasonable necessity, reasonable care, and reasonable use, which "prevail in this state in a liberal form, on a broad basis of general principle" (*Haley v. Colcord*, 59 N. H. 7), as applied to the ownership of real estate, in favor of the principle of absolute dominion, may properly consider a malicious motive immaterial upon the rightfulness of a particular use; but in this state, to do so would be to reject the principle announced in *Bassett v. Company*, 43 N. H. 569, and repeatedly reaffirmed during the last forty years.

It is to be conceded that the maxim *sic utere tuo ut alienum non lœdas* is to be applied as forbidding injury, not merely to the property, but to the right of another. *Ladd v. Brick Co.*, 68 N. H. 185; *Pittsburg, etc. Ry v. Bingham*, 29 Ohio St. 364; *Letts v. Kessler*, 54 Ohio St. 73; *Bonomi v. Backhouse*, E. B. & E. 622, 643; *Jeffries v. Williams*, 5 Exch. 792. But the landowner's right in the enjoyment of his estate being that of reasonable use merely, there attaches at once to each the correlative right not to be disturbed by the malicious, and hence unreasonable, use made by another. To hold that a right is infringed because, by the noxious use made by another, the air coming upon a landowner's premises is made more or less injurious, and to deny the invasion of a right by an unreasonable use which shuts off air and light entirely, is an attempt to bound a right inherent and essential to the common enjoyment of property by the limitations of

an ancient form of action. An unreasonable use of one estate may constitute a nuisance by its diminution of the right of enjoyment of another, without furnishing all the elements necessary to maintain an action *quare clausum fregit*; though in particular cases it may be said that no right is invaded unless something comes from the one lot to the other. *Lane v. Concord*, 70 N. H. 485, 488, 489; *Thompson v. Androscoggin Co.*, 54 N. H. 545, 552; *Wood Nuis.*, s. 611. As, therefore, the statute does not deprive the plaintiff of any right to a reasonable use of his land, but only prohibits an unnecessary, unreasonable use, it does not deprive him of any property right. Hence it is not necessary to inquire whether, as an invasion of property rights, the limitation of the statute is one which might properly be made for the general good.

The objection based upon the unconstitutionality of the statute is not sustained, and the exception to the denial of the motions for a nonsuit and to direct a verdict upon that ground is overruled.

[The verdict was set aside on account of an erroneous ruling as to the admission of evidence.]¹

¹ [As to "spite fence" cases, see 18 Harv. Law Rev. 414-415. — Ed.]

DOERR v. KELLER.

COURT OF COLMAR, MAY 2, 1855.

[*Dalloz, Recueil Périodique*, 1856, 2, 9.]

THE COURT¹. . . Since it appears from the evidence taken in the court below and from a view of the premises in controversy, that there has been for a long time high up in the gable end of the plaintiff's house on the side towards the house of the defendant a window, which served no other purpose than to light a stairway, being accessible only by a ladder resting upon the landing at the top of the stairs, and having an outlook only upon the roof of the defendant's house ;

Since it also appears that the defendant in a spirit of malevolence, without any benefit to himself, and for the sole purpose of damaging the plaintiff, has erected opposite the latter's window, and almost touching it, a false chimney, which, starting from the roof and resting upon the projection of the gable end of his house, almost completely darkens the window, an act which the defendant seeks to justify by reason of his right of property ;

Since, notwithstanding the principle that the right of property is in a certain sense absolute, permitting the owner to use or abuse what belongs to him, it is nevertheless true that the exercise of his right, like the exercise of all rights, should be limited to the satisfaction of a serious and legitimate interest, and since it would be against the principles of morality and justice for the law to sanction an act inspired by malevolence and executed under the influence of an evil passion, not justified by any personal advantage and causing damage to another ;

For these reasons the appeal is dismissed and the judgment of the court below directing the removal of the false chimney is affirmed.

KUZNIAK v. KOZMINSKI.

1895. 107 *Michigan*, 444.

APPEAL from Kent; Adsit, J. Submitted December 3, 1895. Decided December 17, 1895.

Bill by John Kuzniak against Jacob Kozminski and Frances Kozminski to abate an alleged nuisance. From a decree for complainant, defendants appeal. . Reversed.

James E. McBride, for complainant.

Thompson & Temple, for defendants.

¹ The report is slightly abridged. — Ed.

LONG, J. The parties to this cause own adjoining lots in the city of Grand Rapids. Defendants' lot is on the southeasterly corner of Eleventh and Muskegon streets, and upon which is a large tenement house facing both streets. The complainant owns the lot immediately south and adjoining the defendants', and upon which he has a dwelling house facing Muskegon street, and also a tenement house about 60 feet back from Muskegon street, and within 22 inches of the north line, being the line of defendants' lot. At the time this tenement house was erected, defendants had upon their lot what was called a "chicken shed;" and, after complainant's tenement house was erected, defendants moved this chicken shed upon a part of their lot directly opposite complainant's tenement house, and within 24 inches of the lot line, and converted it into a coal and wood house for the use of their tenants, who occupied the dwelling on said lot. This bill was filed by complainant for the purpose of having this coal and wood house of defendants declared a nuisance, and to compel them to remove the same. The claim made by the bill is that the defendants removed the building to that place through spite and from a malicious motive, and not because it was needed for any useful purpose. Defendants answered the bill, denying that they were actuated by malice in putting the building there, and averred that it was so placed for the use of their tenants for wood and coal. The testimony was taken in open court, and the court found that the building was a nuisance, and a decree was entered directing the defendants to remove the building within 60 days from the date of the decree, and that, in default of such removal, the sheriff of the county remove the same, at the cost and expense of defendants. The complainant was awarded the costs of the suit. Defendants appeal.

It was held in *Flaherty v. Moran*, 81 Mich. 52, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, and the decree of the court below ordering its removal was affirmed; but that decision was placed on the ground that the fence served no useful purpose, and was erected solely from a malicious motive. In the present case the building erected by the defendants was for a useful purpose; and, while there may have been some malice displayed in putting it so near the complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed. Defendants had a right to erect a building upon their own premises, and the decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form the basis upon which to found a remedy. In *Allen v. Kinyon*, 41 Mich. 282, it was held that the motive is of no consequence when the party does not violate the rights of another. In *Hawkins v. Sanders*, 45 Mich. 491, it was held that there was no right of prospect which would prevent the erection of an awning on a neighboring

lot. The case does not fall within the rule of *Flaherty v. Moran*, *supra*, and the court below was in error in directing the removal of the building. That decree must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts to the defendants.

The other Justices concurred.¹

LEWIS CHATFIELD v. WALTER M. WILSON.

IN THE SUPREME COURT, VERMONT, NOVEMBER TERM, 1855.

[Reported in 28 Vermont Reports, 49.]

BENNETT, J.² This is the first time, within my knowledge, that the question has ever come before our courts, in relation to the rights of adjoining proprietors of lands to water percolating under the surface, through wet and porous ground, and the case may be considered somewhat important in principle, as well as novel, in this State. The court below, on this point, told the jury, in substance, that the defendant had the right to prevent the escape of water from his own land to the plaintiff's tub, which he had sunk on his own land, and that he might lawfully do all that was necessary to restore the water to its original flow, and that it was not material what his motive was; and that he had the right, on his own land, to prevent the natural flow or escape of water, in or under ground, from his to the plaintiff's land, provided it was done to secure, in a reasonable manner, a supply of water for himself, his farm, and cattle; but if done solely to injure the plaintiff, and deprive him of water, and not to benefit himself, then he would be liable. This charge is evidently based upon the ground that there were certain correlative rights existing between these parties, in the use of the water percolating in and under the surface of the earth. The rules of law which govern the use of a stream of water, flowing in its natural course over the surface of lands belonging to different proprietors, are well settled, and the correlative rights of the adjoining proprietors are clearly defined. Each proprietor of the land has the right to have the stream flow in its natural course over his land, and to use the same as he pleases for his own purposes, not inconsistent with a similar right in the proprietors of the land above or below him; but no proprietor above can diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any proprietor below throw back the water upon the proprietor above, without some license or grant. But we think the law governing running streams is not applicable to underground water, and that no light can be obtained from the law of surface streams.

¹ See *Falloon v. Schilling*, 29 Kansas, 292. — Ed.

² Only the opinion of the court is given, and that, too, is somewhat abridged. — Ed.

We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

In the case of *Acton v. Blundell et al.*,¹ it was held that the owner of land, who had made a well in it, and thereby enjoyed the benefit of underground water, had no right of action against an adjoining proprietor who, in sinking for and getting coal from his own soil, in the usual and in a proper manner, caused the well to become dry. A query is added whether it would have made any difference if the well had been enjoyed by the plaintiff for more than twenty years. In the case of *Roath v. Driscoll*,² the doctrine is fully advanced that no right is gained by a mere continued preoccupation of water under the surface by any artificial means for a period of fifteen years or more. The court say, "Each owner has an equal and complete right to the use of his land and to the water which is in it;" and they say, "The water combined with the earth, or passing through it by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself, any more than the metallic oxyds, of which the earth is composed;" and they further add, "Water, whether moving or motionless, in the earth, is not, in the eye of the law, distinct from the earth." If it is true that subterranean water is to be treated as a part of the earth, it must follow that there are no correlative rights in the enjoyment of such water, between adjoining proprietors of land, and both the case in the 12th of M. & W. and 20 Conn. proceed upon that ground. The case of *Greenleaf v. Francis*³ goes upon the same principle, and it was there held that no action would lie against a man who dug a well on his own land, although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant, or an adverse user. The case is really put upon the ground that "every one has the liberty of doing, on his own ground, whatever he pleases, even though he occasion some damage to his neighbor;" and the court say, "There is nothing in the case, then at bar, which limited or restrained the owners of the estates severally from having the absolute dominion of the soil extending upwards, and below the surface, as far as each pleased." This, in effect, negates the position that there can be, upon common principles, correlative rights in underground water.

The tub was sunk by the plaintiff on his own land, in 1852, and as his evidence tended to prove, a foot or more below the channel of the brook, and that, from this tub, the water was taken by artificial means for the use of the plaintiff; and the case shows that the plaintiff's evidence tended to prove that this tub was supplied with water, which filtrated under ground from the brook, and also from the adjoining land

¹ 12 M. & W. 324.

² 20 Conn. 532.

³ 18 Pick. 117.

of the defendant; and the case, so far as it is sent up to us, only concerns the right of the defendant to cut off the filtration of the water from his own land to the plaintiff's tub by artificial means, and the consequences, if wantonly done.

This, then, is fairly a question as to the rights of the plaintiff in underground water. Putting this case, then, upon the ground that the water in question, while in the earth of the defendant, though percolating through it, is not distinct from it, in the eye of the law it becomes an important inquiry whether the act of the defendant, in the obstruction of the underground water upon his own premises, can be made actionable, simply upon the ground that the motive was bad which induced it. The act of the defendant in the obstruction of the water, being in itself lawful, could not subject the defendant to damages unless, by reason thereof, some right of the plaintiff has been violated. The maxim, *Sic utere tuo, ut alienum non laedas*, applies only to cases where the act complained of violates some legal right of the party; and it has been attempted to be shown that this underground water cannot be made the subject of correlative rights. It is said in Comyn's Digest, under the head of Nuisance, that an action on the case does not lie for the reasonable use of any right, though it be to the annoyance of another. This, it may be said, implies that an action would lie if the use of one's right was unreasonable.

This, no doubt, is true, under proper limitations, as in cases where there is a right common to both parties, as in the use of a public highway, or of the air; or where there is a duty to perform, and a correlative right growing out of it, as the repair of a ruinous house standing so near to the house of another as to endanger it from its fall. In such a case, no doubt, a repair could be compelled; and, in case of the fall, an action would lie for the special damage. There are also many cases in the books, relating to the relative use of surface streams, where the case has turned upon the question whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are correlative rights to the use of the water, and the boundary of the right is a reasonable use of it. But such cases have no analogy to the case at bar, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it. Such was the case of *South Royaltan Bank v. Suffolk Bank*.¹ If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*. On this point the case of *Mahan v. Brown* is a direct authority. There the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house; and it was held that no action would lie, where the lights were not ancient, and no right had been acquired by grant or user; and that the motive with which the act was done was immaterial.

¹ 27 Vt. 505.

This case goes upon the ground that the plaintiff was not injured in a legal right.

This is not like the case where the air is contaminated so as to become noxious. There a correlative right is invaded. In the case of *Greenleaf v. Francis*,¹ it is true, the court charged the jury that if the defendant dug the well where he did, upon his own land for the purpose of injuring the plaintiff, and not for the purpose of obtaining the water for his own use, the defendant was liable in that action. In that case, the verdict was for the defendant, and the plaintiff was the excepting party. The plaintiff could not complain of that part of the charge; and, in bank, there was no occasion to review that part of it; and it is no point in the decision, though Judge Putnam does remark, in the course of his opinion, that "the rights of the defendant should not be exercised from mere malice as the judge ruled below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar, and the one now before us, the position was unsound, and against principle and authority.

*Judgment of the county court reversed, and the cause remanded.*²

ALONZO F. CHESLEY v. BRADBURY F. KING.

IN THE SUPREME JUDICIAL COURT, MAINE, NOVEMBER 29, 1882.

[Reported in 74 Maine Reports, 164.]

BARROWS, J.³ Damages were claimed by the plaintiff for the digging a well in the defendant's land above the plaintiff's spring with the malicious intent of cutting off the sources of supply from said spring, the result of which was that it became dry and useless.

We regard it as settled law in this State that any one may, for the

¹ 18 Pick. 117.

² See *Harwood v. Benton*, 32 Vt. 724, 736, 737.—ED.

³ Only the opinion of the court is given, and that is somewhat abridged.—ED.

convenience of himself or the improvement of his property, dig a well or make other excavations within his own bounds, and will be subject to no claim for damages, although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well or spring of his neighbor. The reasons of the rule have been heretofore so fully discussed that we have no occasion in this connection to do more than cite some of the authorities. *Chase v. Silverstone*; ¹ *Greenleaf v. Francis*; ² *Acton v. Blundell*; ³ *Broadbent v. Ramsbotham*; ⁴ *Chasemore v. Richards*; ⁵ *Wheatley v. Baugh*; ⁶ *Ellis v. Duncan*; ⁷ *Delhi v. Youmans*; ⁸ *Radcliff's Ex'rs v. Mayor, &c.*; ⁹ *Roath v. Driscoll*; ¹⁰ and numerous other cases.

Seeing it is settled that this injury of which the plaintiff complains, is, in ordinary cases, where the owner of the adjacent land exercises his paramount right in good faith for his own or the public convenience or advantage, merely *damnum absque injuria* and no proper foundation for an action, the next inquiry is, whether it becomes a good cause of action where the proprietor of the land makes his excavations not for the purpose of accommodating or benefiting himself or others, but merely to do a damage to his neighbor who has some qualified rights in the spring. There is a conflict of authority either in decisions or *dicta* upon this point, — some courts of high standing, notably those of New York, Pennsylvania and Vermont, having said in some of their cases broadly, in substance, as in *Glendon Iron Co. v. Uhler*,¹¹ that “the commission of a lawful act does not become actionable, although it may proceed from a malicious motive.”

In view of the very numerous cases where “the commission of a lawful act *does* become actionable” by reason of the mere carelessness of him who does it, when it results in damage to innocent parties, it sounds strangely to say that its commission for the sole purpose of inflicting damage upon another and without any design to secure a benefit to its doer or others, is not actionable when the damage intended is thereby actually caused. We rather incline to the view that there may be cases where an act, otherwise lawful, when thus done may combine the necessary elements of a tort, “an actual or legal damage to the plaintiff and a wrongful act committed by the defendant,” — or in other words may be an invasion of the legal rights of another accompanied by damages. One of the legal rights of every one in a civilized community would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred. We think there is more unexceptionable truth in the statement of the general principle in *Com. Dig. Action on the Case, A*: “In all cases where a man has a temporal loss or damage by the wrong of another, he may have an

¹ 62 Maine, 175.

⁴ 11 Exch. 602.

⁷ 21 Barb. 230.

¹⁰ 20 Conn. 533.

³ 18 Pick. 117.

⁶ 7 H. L. Cases, 349.

⁸ 50 Barb. 316.

¹¹ 75 Penn. St. 467.

⁵ 12 Mees. & Wels. 335.

⁶ 25 Penn. St. 528.

⁴ Comstock, 200.

action upon the case to be repaired in damages ;" and in the remark of the court in *Walker v. Cronin*, thereupon : " The intentional causing of such loss to another without justifiable cause and with the malicious purpose to inflict it, is of itself a wrong."

At all events it is worth while to examine the cases which are cited in support of the proposition above quoted from *Glendon Iron Co. v. Uhler*, to see how far the decision rests upon this doctrine, and how far upon other matters.

We think it will be found in most, if not all of them, the case was well disposed of, either on the ground that the plaintiff had not the right or property which he claimed in the subject of the injury, or that the defendant's acts might well be regarded as done not from the sole desire to inflict damage upon his neighbor, but partly at least from a justifiable, perhaps laudable design, to promote his own advantage or that of others, or protect his own property from subjection to some servitude by doing acts which, as between himself and the plaintiff, he lawfully might do, — or because for reasons of public policy the plaintiff was precluded from asserting an act to be maliciously done which was within the scope of the defendant's authority or right, and might well be referred to legitimate motives.

The particular case of *Glendon Iron Co. v. Uhler*, *ubi supra*, seems really to have turned upon the point that plaintiffs could have no exclusive right to use a mere geographical appellation as a trademark, and that the defendant actually manufacturing the same article at the same place was equally entitled to consult his own advantage by using the same name as a trademark. Where the plaintiff had no property to protect, it is perhaps not strange that the court should refuse to go into an inquiry as to the defendant's motives in doing an act which could not constitute an injury. That there was an admixture of what the law regards as a malicious motive for the defendant's act with other indifferent or laudable designs, could not be expected to confer a right of property on the plaintiff which he did not before possess. The case most relied upon to support the doctrine seems to be *Phelps v. Nowlen*, and as it approaches the case at bar perhaps as nearly in its facts as any other citation on the same side, it should receive careful examination. It presents the case of the withdrawal of a favor which the plaintiff had previously received from defendant in the maintenance of an embankment around a spring on defendant's land, which embankment raised the water in the plaintiff's well. The defendant dug through the embankment with the knowledge that such digging would diminish the water in the plaintiff's well and with the intention to do it ; and the case finds " that in so far as such intent and purpose under the circumstances above found can constitute malice, his motive was malicious." But it is difficult to see how the simple withdrawal of a favor which has conferred no vested right to its continuance, can constitute actionable malice. While the court, undoubtedly, *arguendo*, refer approvingly to the doctrine under consideration as laid down very

broadly in the cases cited, it is noticeable that it adverts with satisfaction to the probable existence of a lawful motive, thus: "It may have been lawfully done by the defendant to prevent a diversion of water, the use of which he claimed, and which, if allowed to continue, by lapse of time might ripen into a claim of right by prescription; and hence, although the ostensible object was to diminish water which has been unlawfully appropriated by another, the intent *cannot* well be considered as malicious, or the purpose a wrongful one. That it proves injurious to another is more the fault of the party who reaps a benefit from that which does not belong to him, than of the one who was originally entitled to it and is only claiming his just rights." In further discussion of cited cases, the learned court also advert to the doctrine imported from the civil into the common law, as stated in *Acton v. Blandell* and *Chasemore v. Richards*, *ubi supra*, and remark thereon, "The rules last stated may, perhaps, be applied in cases where it is entirely obvious that the act was done solely for the purpose of inflicting a wrong, and with no intention of vindicating a right or preventing a wrong being done to the interests of another." Certainly the support given by this case to the doctrine contended for is somewhat equivocal, and the case seems really to have turned upon the want of any right in the plaintiff, and the probability of lawful and not (properly speaking) malicious motives in the defendant. The same elements are obvious in other cases cited to maintain this questionable dogma.

Thus in *Auburn Plank Road Co. v. Douglass*,¹ the court seem to have held that, in a case of the dedication of his land by a man to the public for use as a way, they would not inquire into his motives, at the instance of the corporation with a charter right to take toll, who alleged malicious injury. The motive might have been charitable and the court apparently would not repress benevolence or public spirit by such an inquiry into its motives. But upon the same facts it was held that equity would restrain the dedicator from keeping his road open in such a way as to enable those who travelled on the plank road to avoid the toll-gate.²

We see no reason why a man should maintain an action against an underwriter or an insurance company for refusing to contract to insure his property because he has injected into his declaration an allegation that the refusal was malicious. Neither law nor equity could compel them to insure the property of those with whom they did not choose to contract. There is a plain lack of right in the plaintiff, and the proposed inquiry into motives is immaterial. *Hunt v. Simonds*.³

The general doctrine of *Walker v. Cronin* is not what counsel claim, but rather that while a man has no right to protection against competition, he "has a right to be free from malicious and wanton interference, disturbance and annoyance." The *dictum* in *Walker v. Cronin*, adverse to this same doctrine as it was shadowed forth in *Greenleaf v. Francis*,⁴

¹ 5 Selden, 444.² 13 Barb. 553.³ 19 Missouri, 543.⁴ 18 Pick. 117.

seems to be based upon what we conceive to be the erroneous assumption that the owner of a spring has no rights whatever in water percolating through the soil of adjacent proprietors, because his rights therein are assuredly subject to the paramount claims of the owner of the soil, operating in good faith in his own land, "for a justifiable cause."

Why anybody should have supposed that the courts would deem it worth while to indulge a litigious spirit so far as to inquire into the motives of a man who has thrown down fences on his own land, put there to mark the lines of a road never lawfully laid out, is not apparent. Such an immaterial inquiry was properly enough refused in *Jenkins v. Fowler*.

Litigation would be endless if the motives of those who are simply enforcing a legal claim were made the subjects of inquiry. It was rightly held they were not, in *South Royalton Bank v. Suffolk Bank*.¹ And this is in harmony with the doctrine that proof of malice alone will not support an action for malicious prosecution when there is probable cause. Nor would it be wise as matter of public policy, to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one who chooses to imagine or assert that he is aggrieved by their doings, to make use of an allegation that they were malicious in motive to harass them with suits on that ground, and it was rightly forbidden in *Benjamin v. Wheeler*.² And here we come to the reasons well worthy to be considered, given for the rule in *Phelps v. Nowlen*: "A different rule would lead to the encouragement of litigation, and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil. . . . Malice might easily be inferred sometimes from idle and loose declarations, and a wide door be opened by such evidence to deprive an owner of what the law regards as well defined rights."

Apparently it is the danger of just such verdicts as that which was rendered in the case at bar, which has induced these courts of high standing to make a sweeping denial of the right to inquire into motives in such cases as we have been reviewing, where no substantial right of the parties complaining has been infringed.

We are not satisfied, however, that the rule can be maintained as broadly as it has been asserted on this account, and we think there is a still greater danger of its being perverted into a bulwark of oppression and injustice, by the denial of a remedy where a substantial right has been invaded. It seems to us that the denial is broader than the cases required. We think it cannot be regarded as a maxim of universal application that "malicious motives cannot make that a wrong which in its own essence is lawful."

Chatfield v. Wilson is an authority not to be overlooked, for the

¹ 27 Vt. 505.

² 8 Gray, 409.

instructions of Poland, J., there considered and condemned, were not substantially different from those given in the case at bar, and the court say: "It may be laid down as a position not to be controverted that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it,"—apparently assuming that the wanton infliction of damage is not a violation of legal right. Washburn in his *Treatise on Easements, &c.*, has an instructive review of decisions touching this point, (pp. 488–492, 3d ed.) and notices (as do the court in *Phelps v. Nowlen*,) the fact that in the later case of *Harwood v. Benton*,¹ the Vermont court remark upon the absence of any imputation of wanton and improper motive as an element in the defendant's liability, and seem purposely to avoid expressing any opinion as to the correctness of *Chatfield v. Wilson* on that point.

In commenting upon the general aspect of the question, Washburn says in substance, that courts unequivocally recognize one's right to have his well or spring supplied by underground sources so far as to protect it against invasion by a stranger, and he adds: "It would therefore seem to constitute a something of which *meum* and *tuum* might be predicated, and in regard to which the maxim, *Sic utere tuo*, &c., would not be wholly foreign, especially when the party destroying it does it by using his property, not for his own benefit, but solely for the purpose of depriving his neighbor of what he would otherwise have rightfully enjoyed."

Upon the whole we are better satisfied with the view of the law on this point which we get from *Acton v. Blundell*, *Roath v. Driscoll*, *Wheatley v. Baugh*, hereinbefore cited, and from *Panton v. Holland*,² and from the instructions approved in *Greenleaf v. Francis*,³ than with that given in *Chatfield v. Wilson*.

We think this plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it "for the mere, sole and malicious purpose" of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate.

But the testimony is of a character that conclusively negatives the defendant's guilt. The vital facts in the case show that he suffered from a short supply of water now and then during all the years that his aqueduct ran through the plaintiff's land because the plaintiff's premises were lower than his, and the plaintiff persisted, even in dry times, in exercising the advantage which he thereby had. The conclusion upon the whole evidence is irresistible that the defendant, after a long trial, was justified in severing his aqueduct from that which ran to the plaintiff's premises. Upon his doing so, the plaintiff continued his aqueduct as he had a right to do to the spring, and entered it at a

¹ 32 Vt. 737.

² 17 Johns. 92, 98.

³ 18 Pick. 119.

point lower than the defendant, and defendant was again deprived of a sufficient supply. There is no testimony which, fairly weighed, can lead to the conclusion that he dug the well for any purpose except to supply the deficiency that he experienced. The special finding on this point is altogether against the weight of evidence, and must be set aside. *Motion sustained. Verdict set aside. New trial granted.*¹

¹ Approved in *Stevens v. Kelley*, 78 Me. 445, 452; *Roath v. Driscoll*, 20 Conn. 533, 540, 543, 544 (*semble*); *Greenleaf v. Francis*, 18 Pick. 119 (*semble*); *Swett v. Cutta*, 50 N. H. 439, 447 (*semble*); *Trustees v. Youmans*, 50 Barb. 316, 327 (*semble*); *Wheatley v. Baugh*, 25 Pa. 528, 533 (*semble*) *Accord*.

The question was left open in *Frazier v. Brown*, 12 Oh. St. 299, 303, 304. See *Chasemore v. Richards*, 7 H. L. C. 349, 353; *Smith v. Kenrick*, 7 C. B. 515; *Markby, Elements of Law*, § 289.

The Roman law was in accordance with the principal case: D. 39, 3, de aqua, § 12: "Denique Marcellus scribit cum eo qui in suo fodiens vicini fontem avertit nihil posse agi, nec de dolo actionem: et sane non debet habere, si non animo vicino nocendi sed suum agrum meliorem faciendi id fecit."

The Scotch text-writers adopt the same view: "The law interposes so far for the public that it suffers no person to use his property wantonly to his neighbor's prejudice; *interest reipublice ne quis re sua male utatur*." *Eskine, Inst.* (8th ed.) book ii. Tit. 1, § 2: "No one, however, is entitled, even within his own limits, to act wantonly, with the mere purpose of producing inconvenience and loss to his neighbor, *in amulationem vicini*. This, however, is never to be presumed, but must be proved." *Bell, Principles* (9th ed.), § 964. See also *Fraser v. Dewar*, *Mor. Dict.* 12803-4.

In Germany, also, the most authoritative writers allow an action against a defendant who acts out of mere malice. "The exercise of a right is not rendered unlawful by the fact that another is damaged thereby; it is only unlawful to exercise a right solely in order to injure another." *Windscheid, Pandektenrecht* (4th ed.), vol. i., § 121, citing authorities. The German literature upon this subject may be found in *Heese, Rechtsverhältnisse zwischen Grundstücksanachbarn*, p. 553-568. — *Ed.*

["The exercise of a right is not permitted when its sole object is to injure another." *German Civil Code*, section 226.]

BARCLAY v. ABRAHAM.

1903. 121 Iowa, 619.

APPEAL from Boone District Court. — HON. J. R. WHITAKER, Judge.

Plaintiff is owner of S. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 10, and N. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of section 15, township 82 N., of range 25 W. of the fifth P. M. The defendant owns the N. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 10. A run, known as "Big Creek," nearly north and south, passes through both farms to the south. Following the trend of this creek for three or four miles in a northwesterly and southeasterly direction, and about one-half mile wide, flowing wells are obtained at a uniform depth, considering the elevation of the surface. The plaintiff has lived some time on his south eighty at about the center of this district, and several years ago sunk one of the first wells near his house, somewhat above the level of the creek. Later two other wells were sunk, one in the valley of the creek in the north eighty, and the other about thirty rods from his barn, to which an underground pipe was extended to a tank at the barn. In July, 1901, the defendant Abraham put down a three-inch well on his farm near the south line, close to the creek, to which he dug a ditch, and allowed the water to flow unrestrained through the creek to the land below. This resulted in stopping the flow of water from plaintiff's wells at his house and near the barn. In pursuance of a temporary writ of injunction, the flow of defendant's well was reduced to one-fourth of an inch, whereupon water again flowed from plaintiff's well. Upon final hearing the injunction was made permanent, and defendant appeals. — *Affirmed.*

W. W. Goodykoontz and Crooks & Snell for appellant.

Charles Whitaker for appellee.

LADD, J. — The particular district within which flowing wells may be obtained at a depth varying from one hundred to two hundred feet is three or four miles in length by about one-half mile in width, following the direction of the creek. Within this area there are at least eleven wells which are now or have been flowing above the earth's surface. That of plaintiff, near his barn, is one hundred and fifty-two feet deep. The well sunk by defendant is only one hundred and seven feet deep, but on ground about as much lower as the difference. Its casings are three inches in diameter, and the flow, when uninterrupted, has the effect of stopping plaintiff's well and of several others. It is located near the south line of defendant's land, from which the water runs in the creek, and, save that necessary for about thirty head of cattle, is without benefit to him or any one else. The water in excess of a stream one-fourth inch in diameter, to which extent the district court directed him to restrain the flow, is absolutely wasted, and so done without excuse. True, he pretended that the entire flow was essential to prevent clogging with sand or gravel, but the evidence

shows conclusively that this was less likely with the smallest available exit. Again, he pretended to have in contemplation the elevation to his tenant's house, across the eighty acres, up some forty feet, of water for domestic use by the operation of a hydraulic ram. But the extent of his preparation therefor was the reading of a circular from some manufacturing company. There was no proper showing that the flow permitted would be inadequate for this purpose, and it conclusively appears that it had nothing to do with his insistency upon utterly wasting the water his neighbors so much needed. Indeed, the record indicates strongly his object was to maliciously cut off the water supply of a well owner other than plaintiff. In the light of these facts, it is not very important that we determine whether the water was supplied by percolation through the soil or a well-defined subterranean stream. If the latter, of course the water might not thus be diverted. *Hougan v. Ry. Co.*, 35 Iowa, 558; *Burrows v. Satelee*, 67 Iowa, 396; *Willis v. Perry*, 92 Iowa, 297.

But the presumption obtains that such waters are percolating waters, unless shown to be supplied by a stream of known and defined channel.

[After some discussion, the learned Judge said: there is nothing in the record to overcome the presumption that the supply of the entire district is percolating water.]

This being true, there is no doubt but defendant had the right to make such beneficial use of the water in the improvement of his land as he might choose. But it does not follow that he had the right to draw from this reservoir within the earth wherein nature had stored water in large quantities for beneficial purposes merely to waste or carry out a design to injure those having equal access to the same supply. Decisions to the effect that percolating waters are to be treated the same in law as the land in which found, and may be diverted, consumed, or cut off with impunity; without liability for interfering or destroying the supply, are numerous in this country and England—too numerous for citation; but see *Wheatley v. Baugh*, *supra*, *Mayer & Aldeman, etc., v. Pickles*, A. C. (1895) 587, and *Frazier v. Brown*, 12 Ohio St. 294. In the last of these cases the principle underlying the right to such waters, and the reasons upon which it rests, were thus stated: "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be, therefore, practically impossible; (2) because any such recognition of correlative rights would interfere, to the material detriment

of the commonwealth, with drainage, and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility." An examination of the authorities, however, indicates that they proceed upon the theory that the right thereto relates to the beneficial use of the land, and is connected with its enjoyment for the purposes of agriculture, mining, trade, improvement, and the like. This thought is emphasized by the dicta in many decisions to the effect that percolating waters may not be extracted from the earth to the injury of others merely to gratify malice. Thus, in the leading case of *Wheatley v. Baugh*, *supra*, the court declared that "neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice. The reason is that water, like air, is of such a nature that no one can have an exclusive right in it. In the process of evaporation and condensation it is sent in refreshing showers all over the earth. In its descent into the ocean it necessarily passes from the one to the other, and is intended for the benefit of all. The right of each is more or less dependent upon that of his neighbor." See, also, *Greenleaf v. Francis*, 18 Pick. 119, where it was held that an owner may dig a well in any part of his land, even though the water in his neighbor's well be diminished, but with this limitation, that in doing so he is not actuated by a malicious intent to deprive his neighbor of water without benefit to himself. The right being conceded, possibly the intent with which exercised would be immaterial. On this point the authorities are in conflict. See *Chesley v. King*, 74 Me. 164 (43 Am. Rep. 569); *Huber v. Merkel* (Wis.) 94 N. W. Rep. 354.

The important intimation to which we wish to direct attention is that with respect to the beneficial use. A decided tendency to depart from the strict rules of the common law with respect to percolating waters in the adjustment of modern conditions is manifest in recent decisions. In the well-considered case of *Stillwater Water Co. v. Farmer* (Minn.) 93 N. W. Rep. 907 (60 L. R. A. 875), the Supreme Court of Minnesota held that sub-surface water might not be drained from his land by an owner merely to pour it into a sewer, when this resulted in depriving a company of the supply from which it furnished the people of a city. There the plaintiff supplied water for domestic purposes to the people of the city of Stillwater from a spring about which it had constructed a wall some six feet in diameter. This was within a few feet from the boundary line between the company's and Farmer's land. Near this line, and not more than ten feet from the center of the spring, Farmer excavated a trench, and placed in it a ten-inch tile drain connected with the city sewer. As a result percolating waters were drawn away from the spring, where they would naturally have gone, materially affecting the supply of water in the spring. Thereupon the company made a change in the outlet and in the mains to guard against such loss; whereupon Farmer began to lay his tile

at a lower level, commencing at the sewer. A temporary injunction was granted, and in a well-considered opinion the court held that defendant might not even collect percolating waters merely to squander them to the detriment of his neighbor. The theory of the decision is that, while ownership of the soil extends to the center of the earth, it is somewhat restrained by the maxim, "*Sic utere tuo ut alienum non laedas.*" The court directs attention to the fact that in nearly every case where the right to collect or divert percolating waters has been upheld this has been for some beneficial purpose, and pertinently suggests that there is no good reason for not applying the doctrine of correlative rights in such a case, and that such application will not interfere with proper improvement of land, but tend to promote the general welfare of all citizens alike. The rule approved is thus stated: "Except for the benefit and improvement of his own property or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a landowner must not collect and wantonly waste percolating waters, which would otherwise be or have theretofore been appropriated by his neighbor for the general welfare of the people."

The doctrine of correlative rights between landowners respecting the appropriation and use of percolating waters has been broadly applied in New Hampshire (*Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569 [82 Am. Dec. 179]; *Swett v. Cutts*, 50 N. H. 439 [9 Am. Rep. 276]), where the court declared that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, though not real, hostility. The courts of New York seem to have held that the owner of land may not sink wells on his own land from which, by the use of pumps of potential force and reach, he may drain the percolating waters from the premises of his neighbors to their injury, merely for the purpose of merchandising the water to consumers distant from the land. *Forbell v. City of New York*, 164 N. Y. 522 (58 N. E. Rep. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666). In that case it was said: "In the absence of contract or enactment, whatever it is reasonable for the owner to do with his sub-surface water, regard being had to the definite rights of others, he may do. He may make the most of it that he reasonably can. It is not unreasonable, so far as it is now apparent to us, that he should dig wells, and take therefrom all the water that he needs, in order to the fullest enjoyment and usefulness of his land as land, either for purposes of pleasure, abode, productiveness of soil, trade, manufacture, or for whatever else the land as land may serve. He may consume it, but must not discharge it to the injury of others. But to fit it up with walls and pumps of

such pervasive and potential reach that from their base the defendant can tap the water stored in the plaintiff's land, and in all the region thereabout, and lead it to his own land, and by merchandising it prevent its return, is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and the others whose lands are thus clandestinely sapped, and their value impaired." The opinion seems to be grounded upon the notion that extracting the water by force constituted a trespass, and the court, apparently in recognizing a departure from previous decisions, added: "We more readily conclude to affirm because the immunity from liability which defendant claims violates our sense of justice. It seems to pervert just rules to unjust purposes. It does wrong under the letter of the law, in defiance of its spirit." *Smith v. City of Brooklyn* (Sup.), 46 N. Y. Supp. 141, is referred to approvingly. In that case, upon full consideration, the court declared that, while waters might be extracted from the depths for the reasonable use or improvement of the land, the law will not allow this to be done for some purpose unconnected with the use, improvement, or enjoyment of the land itself to the detriment of adjoining owners. See same case on appeal (160 N. Y. 367 [54 N. E. Rep. 787, 45 L. R. A. 664]).

It is not necessary to go to this extent in order to sustain the decree in this case. The water from defendant's well, in excess of that allowed him by the court, fell to the earth, and immediately flowed from his land on that of a neighbor below. He proposed to draw the percolating waters, not to supply the people of a great city, but to waste without advantage to any one. In principle the case is like that of *Stillwater Water Co. v. Farmer*, *supra*, and we are inclined to approve the doctrine therein announced. A contrary conclusion would permit defendant, by allowing his well to flow at full capacity, not only to stop plaintiff's well, but every other well in the neighborhood, and this without the slightest benefit to himself. Indeed, this is precisely what he has threatened if interfered with. May one man thus waste the waters stored by nature for the community and wantonly deprive it of their use? Are the courts powerless to remedy such a wrong? The Supreme Court of Wisconsin seems to have so held. *Huber v. Merkel* (Wis.), 94 N. W. Rep. 354. A distinction between an injury to the quality of the neighbor's land, as in *Forbell v. City of New York*, and to the enjoyment of its use, is suggested, but this is not substantial. See, also, *Hague v. Wheeler*, 157 Pa. St. 324 (27 Atl. Rep. 714, 22 L. R. A. 141, 37 Am. St. Rep. 736). Certainly no good reason can be found for allowing the owner of land to draw sub-surface water therefrom merely to waste, when this results in draining like water from his neighbor's land, to his detriment in its use and enjoyment. Water moves so readily from one place to another that any definite portion of it cannot be said to be the property of the owner of the soil until in some way reduced to control. The water flowing in defendant's well may have been from plaintiff's land or that of some

other well-owner a moment previous. In this respect it differs from minerals beneath the surface, and is more like natural gas, which may not be allowed to escape by a landowner, when not made use of, to the detriment of his neighbors. *Ohio Oil Co. v. Indiana*, 150 Ind. 698 (50 N. E. Rep. 1124); *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (20 Sup. Ct. Rep. 576, 44 L. Ed. 729).

Possibly he may waste that on his own land, if he can do so without draining water from his neighbor's. But the source of the supply of percolating waters can seldom be determined, and this is one of the main reasons for permitting its free appropriation by the owner of the soil. A different rule would undoubtedly restrict the use and improvement of land. But the prevention of carrying the water from the land of the owner for the purposes of commerce or waste cannot retard the improvement of the land itself, and there is no just ground for tolerating such diversion when the direct result is to deprive the adjoining landowners by the incidental drainage of their land of a supply of water from the same natural reservoir. This would be extracting the subterranean water from the adjoining land to its injury, without any counter benefit to the land through which taken. This is a stronger case for the interference of a court of equity than *Forbell v. City of New York*. There the drainage rendered the adjoining land unfit for the growth of water cresses, which had formerly been raised upon it; here it destroyed the water supply essential for its customary use and enjoyment. There the drainage was to secure water to distribute to the inhabitants of a great city for profit; here the object was to turn it into a creek to flow unused in any way down to another's land below. The soundness of some of the reasoning of the *Forbell Case* may well be doubted. The exertion of the force there was in the removal of the subterranean waters in the city's land, and the only suction occasioned was by emptying a cavity into which the water naturally drained from the surrounding country. It is at least exceedingly doubtful whether this constituted trespass. In a lesser degree this happens whenever the sinking of one well has the effect of drying up another. The doctrine of *Smith v. City of Brooklyn*, that the free use of such waters is limited to the improvement, use, and enjoyment of the land from which taken, and cannot be carried away for the purposes of commerce, to the injury of the premises of an adjoining owner, has the better reason for its support. But we need not go this far, even to sustain the decree of the district court, as in the case at bar the owner derived no benefit from the sale or use of the water. As said, the case is in principle like *Stillwater Water Co. v. Farmer*, *supra*. The doctrine there announced is in harmony with good morals. It interferes with no valuable right of the defendants. It shields from destruction property rights of great value belonging to the plaintiff and others. It goes no farther than to say that a landowner may not collect, drain, or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on

his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. It applies in principle the doctrine of correlative rights to the control of sub-surface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken.

Affirmed.

DEEMER, J., concurs in result.¹

¹ [1] Has the owner of land the same ownership and control of percolating water (water passing, or filtering, through the ground beneath the surface of the earth, without flowing in definite channels), that he has of the soil, *e. g.* the sand and the rocks.

Or (2) has he only a limited and qualified right in the percolating water; a right of reasonable user limited by the correlative rights of his neighbors?

On those questions there is, in recent cases, a conflict of authority. The subject would seem to fall under the head of Property (see cases collected in 2 Gray's Cases on Property, 2d ed., 116-136); and cases requisite for a full discussion of it are not inserted in the present collection of Cases on Torts. Authorities will be found in an excellent article by Professor Huffcut, 13 Yale Law Journal, 222; and in 3 Farnham on Waters, sec. 935 *et seq.* For good illustrative cases endorsing the first theory, see *Acton v. Blundell*, 12 M. & W. 324; *Mayor of Bradford v. Pickles*, L. R. (1895), Appeal Cases, 587; and *Meeker v. City of East Orange*, 76 N. J. Law, 435. For good illustrative cases favoring the second theory, see *Bassett v. Salisbury Manuf. Co.*, 43 New Hampshire, 569 (where the question related to the right of the defendant to prevent water percolating under the surface of plaintiff's land from passing off through defendant's land), and *Katz v. Walkinshaw*, 141 Calif. 116, 140, 141.

We are concerned here only to point out how the adoption of one or the other of the above conflicting views may affect the materiality of the landowner's motive in the use of percolating water.

If the first theory is adopted, then, in some jurisdictions, the landowner would not be held liable, even though actuated by bad motive (*Mayor of Bradford v. Pickles*, L. R. 1895, Appeal Cases, 587); and, in all other jurisdictions, he would be liable only when, and because, he was actuated by bad motive.

But if the second theory is adopted, the landowner might frequently be held liable, irrespective of motive. On the second theory percolating water might be regarded as, in a certain sense, the common property of the adjoining owners (bearing some analogy to an underground lake); and it would be held that each owner is entitled to only a reasonable share, and is entitled to use that share only for certain purposes. See 3 Farnham on Waters, s. 935. Upon this view an owner who uses more than his share, or who uses it for purposes outside those legally allowable, would be liable entirely irrespective of motive. "Later American cases," says Professor Huffcut, "transfer the emphasis from the showing of 'malice' to a showing of 'unreasonable user,' which may or may not be accompanied by malice." 13 Yale Law Journal, p. 222.

We may add that if bad motive should not be held, in itself, a substantive ground of liability, yet the existence of bad motive might be a piece of evidence bearing upon the question of reasonable user. User for the sole purpose of gratifying ill will might not be deemed reasonable.

On the general question of liability for malevolent acts in reference to percolating water, see 18 Harv. Law Rev., pp. 414, 415. — ED.

CHAPTER IX.

MALICIOUS CONSPIRACY.

GREGORY v. THE DUKE OF BRUNSWICK AND H. W.
VALLANCE.

IN THE COMMON PLEAS, NOVEMBER 25, 1843.

[Reported in 13 *Law Journal Reports*, *Common Pleas*, 34.]

CASE. The declaration stated that the plaintiff, before and at the time of the making of the conspiracy, confederacy, combination, and agreement by the defendants, thereafter mentioned, was about to become an actor, and to use and exercise the profession and occupation of an actor, and to appear at Covent Garden Theatre, in the character of Hamlet, at the request of A. Bunn, for reward to be paid to the plaintiff, by the said A. Bunn. Yet the defendants, together with other persons, whose names were unknown to the plaintiff, falsely, wickedly, and maliciously, did among themselves conspire, combine, confederate, and agree together, to prevent the plaintiff from performing in public, as such actor as aforesaid, in the character of Hamlet, &c., and to prevent the plaintiff from exercising his said profession or occupation of an actor. That the defendants, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement, had, among themselves and the said other persons as aforesaid, and in order to carry the same into fulfilment, hired and engaged divers, to wit, two hundred persons, whose names are unknown to the plaintiff, to attend; and they did accordingly attend as part of the audience in the said theatre on the occasion when the plaintiff was to perform as aforesaid, to hoot, hiss, groan, and yell at and against the plaintiff, and to make a great noise, outcry, uproar, and riot at, and against the plaintiff during his performance of the said character, &c., and to aid and assist the defendants and the said other unknown parties first mentioned in carrying into effect and fulfilment their unlawful and malicious conspiracy, combination, confederacy, and agreement aforesaid. The declaration then averred that the plaintiff did appear and perform as such actor, in the character of Hamlet, for reward to be paid to him by A. Bunn, and that while he was so appearing and performing, &c., the defendants, in pursuance of the said malicious conspiracy, confederacy, &c., did, together with divers others of the said persons so hired and engaged, &c., in the said theatre, and in the presence and hearing of the plaintiff, and of the said public audience, hoot, hiss, &c., at the plaintiff, and make a great, hideous, and intoler-

able outcry against the plaintiff, and induce other persons to join in the same, insomuch that the plaintiff was in consequence thereof compelled to desist from the performance of the character of Hamlet, on the occasion aforesaid. There was an allegation of special damage thereby, that A. Bunn was obliged to refuse and did refuse to allow the plaintiff to perform at subsequent times, as an actor in the said theatre, for gain and reward, as the said A. Bunn otherwise might and would have done, and that the plaintiff had been thereby hindered from exercising his profession of an actor, &c.

Pleas — First, Not guilty.

The cause came on for trial before Tindal, C. J., at the Middlesex sittings, after last Trinity term, when the plaintiff's counsel stated, that the question for the jury upon the record was, whether the defendants had not conspired to injure the plaintiff in his character as an actor, and to drive him from the stage. Evidence was given which proved that there had been a riot at the theatre, by which the plaintiff was prevented from performing as an actor, and it was sought to show that this riot had been instigated and brought about by previous preconcert between the defendants and others. The learned Chief Justice told the jury that the question for them was, whether a conspiracy had been entered into by the defendants, and whether in pursuance of such conspiracy they were engaged in the proceedings mentioned in the declaration. The jury found a verdict for the defendants.

Shee, Serjt., in this term, (November 6), moved for a rule to show cause why the verdict should not be set aside, and a new trial had, on the ground of misdirection, and that the verdict was against the evidence.

COLTMAN, J. In this case, a new trial was moved for, first, on the ground of misdirection; and, secondly, on the ground that the verdict was against evidence. The alleged misdirection on the part of the Lord Chief Justice consisted in his omitting to tell the jury that either of the two defendants might be found guilty of the charge contained in the declaration, although the other was acquitted, and in his telling them that unless a conspiracy was proved against both the defendants, they ought to find their verdict for the defendants. My Brother Shee, in moving for the rule, said, that in his address to the jury, upon the trial of the cause, he did not insist upon the point, that a verdict might be found against one of the defendants only, because he thought that the interests of his client would be better served, if the attention of the jury were confined to the charge of conspiracy. After this deliberate election, my brothers Erskine and Maule concur with me in thinking that the learned serjeant is not entitled to come to the court for a new trial on the ground of misdirection. It may be true, in point of law, that upon this declaration the plaintiff might have obtained a verdict against one of the defendants only; but the only question raised by him at the trial, and to which the whole of the evidence was directed, was whether there was in fact any malicious

conspiracy and combination on the part of the defendants. When, therefore, the counsel for the plaintiff thought proper at the trial to rest his whole case upon the charge of conspiracy, the judge was warranted in saying, that unless the conspiracy was made out, the defendants must succeed, as it would have been unfair to have submitted to the jury a question to which the attention of the defendants' counsel had not been called. There is no ground, therefore, for a rule upon the first point. As to the second point, the court thinks the matter deserving of further consideration; and therefore, upon the ground that the verdict was against evidence, a rule *nisi* will be granted.

*Rule refused on the first and third points;
rule nisi granted on the second point.*

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